VOLUME X. NUMBER 2.

Massachusetts Law Quarterly

FEBRUARY, 1925

CONTENTS

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

LIST OF OFFICERS AND COMMITTEES

OF THE

MASSACHUSETTS BAR ASSOCIATION

FOR 1924–1925.

President.

GEORGE L. MAYBERRY,
Waltham.

Vice-Presidents.

FREDERIC DODGE,
Belmont.

WILLIAM CALEB LORING,
Boston.

Treasurer.

JOHN W. MASON,
Northampton.

Secretary.

FRANK W. GRINNELL,
Boston.

Executive Committee.

Thomas W. Proctor,	Newton.	Frederick W. Mansfield,	Boston.
Horace E. Allen,	Springfield.	Philip Nichols,	Boston.
Arthur W. Blakemore,	Newton.	Edwin G. Norman,	Worcester.
Harold S. R. Buffinton,	Fall River.	Robert C. Parker,	Westfield.
Francis Burke,	Boston.	Felix Rackemann,	Milton.
Frederick H. Chase,	Milton.	James M. Rosenthal,	Pittsfield.
Edward T. Estey,	Worcester.	William R. Sears,	Boston.
Francis P. Garland,	Boston.	Homer Sherman,	Charlemont.
Bert E. Holland,	Boston.	Fitz-Henry Smith,	Boston.
Edward A. MacMaster,	Bridgewater.	James W. Sullivan,	Lynn.
		Michael A. Sullivan,	Lawrence.
		Frederick N. Wier,	Lowell.

The President, Mr. Proctor, the Retiring President, the Secretary and the Treasurer are members of the Executive Committee, *ex officio*.

Committee on Legislation.

EDWIN G. NORMAN, *Chairman*, Worcester.

ARTHUR F. BICKFORD,	Cambridge.	HENRY M. HUTCHINGS,	Dedham.
RAYMOND A. BIDWELL,	Springfield.	JOSEPH MICHELMAN,	Boston.
CHARLES P. CURTIS, JR.,	Boston.	HAWLEY K. RISING,	Boston.
WILMOT R. EVANS, JR.,	Everett.	WILLIS SIBLEY,	Worcester.
JAMES A. HALLORAN,	Norwood.	EDMUND A. WHITMAN,	Cambridge.
JOHN E. HANNIGAN,	Cambridge.	THE SECRETARY.	
THOMAS HUNT,	Boston.		

Committee on Judicial Appointments.

THOMAS W. PROCTOR, *Chairman*, Newton.

CHARLES H. BECKWITH,	Springfield.	STARR PARSONS,	Lynn.
ROBERT P. CLAPP,	Lexington.	GEORGE S. TAFT,	Worcester.
DAMON E. HALL,	Boston.	FREDERICK N. WIER,	Lowell.
FREDERICK W. MANSFIELD,	Boston.	JOSEPH WIGGIN,	Malden.

Committee on Grievances.

FRANK M. FORBUSH, *Chairman*, Newton.

HORACE E. ALLEN,	Springfield.	MARCUS MORTON, JR., Secretary,	Boston.
STOUGHTON BELL,	Cambridge.		
GEORGE R. BLINN,	Bedford.	JOHN G. PALFREY,	Sharon.
MALCOLM DONALD,	Milton.	WALTER S. PINKHAM,	Quincy.
EDWARD FISCHER,	Boston.	PHILIP RUBENSTEIN,	Boston.
HENRY H. FULLER,	Lancaster.	REGINALD H. SMITH,	Boston.
FRANCIS C. GRAY,	Boston.	JOSEPH D. TAYLOR,	Boston.
BERT E. HOLLAND,	Boston.		

Committee on Legal Education.

SAMUEL C. BENNETT, *Chairman*, Weston.

HOLLIS R. BAILEY,	Cambridge.	GUY NEWHALL,	Lynn.
JOSEPH H. BEALE,	Cambridge.	JAMES W. SULLIVAN,	Lynn.

Committee on Membership.

RAYMOND S. WILKINS, *Chairman*, Salem.

JOHN M. BULLARD,	New Bedford.	IRVING H. GAMWELL,	Pittsfield.
JAMES A. CROTTY,	Worcester.	GEORGE W. HOWE,	Lynn.
JOHN B. CUMMINGS,	Fall River.	BENNET SANDERSON,	Boston.
FREDERICK J. DILLON,	Boston.	CHARLES J. WESTON,	Springfield.
JAMES A. DONOVAN,	Lawrence.	THE SECRETARY.	

Committee on Nominations.

ARTHUR LORD, *Chairman*, Plymouth.

HERBERT PARKER,	Lancaster.	WILBUR E. ROWELL,	Lawrence.
CLIFFORD A. COOK,	Milford.	JOHN A. SULLIVAN,	Boston.
WILLIAM E. FOWLER,	Westboro.	WILLIAM G. THOMPSON,	Newton.
ADDISON L. GREEN,	Holyoke.	MILTON B. WARNER,	Pittsfield.

Committee on Publication of the Massachusetts Law Quarterly.

THE PRESIDENT, *ex officio*.
THOMAS HOVEY GAGE.
GEORGE R. NUTTER.
THE SECRETARY.

List of Past Presidents of the Association.

RICHARD OLNEY, of Boston, 1909–1910.
ALFRED HEMENWAY, of Boston, 1910–1911.
CHARLES W. CLIFFORD, of New Bedford, 1911–1912.
JOHN C. HAMMOND, of Northampton, 1912–1913.
MOORFIELD STOREY, of Boston, 1913–1914.
HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.
FREDERICK P. FISH, of Brookline, 1919–1920.
EDWARD W. HUTCHINS, of Boston, 1920–1921.
ADDISON L. GREEN, of Holyoke, 1921–1922.
THOMAS HOVEY GAGE, of Worcester, 1922–1923.
THOMAS W. PROCTOR, of Newton, 1923–1924.

OFFICERS OF THE AMERICAN BAR ASSOCIATION FOR 1924–1925.

President: CHARLES E. HUGHES, Washington, D. C.

Secretary: WILLIAM C. COLEMAN, Citizen's National Bank Building, Baltimore, Md.

Treasurer: FREDERICK E. WADHAMS, 78 Chapel St., Albany, N.Y.

Vice-President for Massachusetts: SAMUEL WILLISTON, Cambridge, Mass.

Member of General Council for Massachusetts: JOHN E. HANNIGAN, Cambridge, Mass.

Local Council for Massachusetts:

ROBERT A. B. COOK, Boston.
T. HOVEY GAGE, Worcester.
FREDERICK W. MANSFIELD, Boston.
WENDELL G. BROWNSON, Springfield.

THE CONSTITUTIONAL REQUIREMENTS AS TO PUNISHMENTS FOR SECOND OFFENSES.

In the administration of the law the courts are bound by the requirements of the Constitution. As so many questions have been asked recently showing that these requirements, in connection with second offenses, are not generally understood, the following passages are called to the attention of the bar and the public. A statute of 1880 provided an increased penalty for drunkenness if a defendant had been convicted twice before within twelve months and that "it shall not be necessary in *complaints* under the act to allege such previous convictions." The penalty for a single offense was then $1. In *Commonwealth v. Harrington*, 130 Mass. 35, a judge received evidence of previous convictions in a case under the act in which no previous convictions were charged and the case was carried to the Supreme Judicial Court. In a unanimous opinion that court referred to the 12th Article of the Declaration of Rights in the Massachusetts Constitution, which has provided ever since 1780 that:

> "No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally described to him."

The court then continued:

> "When a statute imposes a higher penalty on a third conviction it makes the former convictions a part of the description and character of the offense intended to be punished. It follows that the offense which is punishable with the higher penalty is not fully and substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it. That clause of the statute, therefore, which provides that it shall not be necessary in complaints under it to allege such previous convictions, is inoperative and void, as being contrary to the Declaration of Rights. The result is, that the defendant is to be sentenced for a single offence of drunkenness."

This case was reaffirmed in 1916 in the case of *Walsh v. Commonwealth* 224 Mass. 39 in which the defendant was fined $50 for illegal clam-digging when the statute provided a maximum penalty of $10 for a first offense. In reversing the sentence, Chief Justice Rugg said:

> "As the complaint contained no averment of a previous conviction for a like offense the only sentence which lawfully could have been imposed . . . was . . . for a first offense."

It is not the business of a judge to act as a prosecuting officer and to draw complaints. As stated in the 29th Article of the Bill of Rights, Massachusetts expects judges to be impartial and not to prepare and present the cases on which they are to sit in judgment. The people do not want or expect them to be both prosecutors and judges. The drawing of complaints and the examination of records in preparation for them must be done by those whose business it is to prosecute.

F. W. G.

FIFTEENTH ANNUAL MEETING.

The fifteenth annual meeting of the Massachusetts Bar Association was held in the Boston Chamber of Commerce Building, Federal Street, Boston, on Thursday, November 20, 1924, at 4 P. M.

The meeting was called to order by the president, Thomas W. Proctor of Newton.

A detailed account of the last annual meeting having been printed in the QUARTERLY for January, 1924, the reading of the minutes was dispensed with.

REPORT OF THE EXECUTIVE COMMITTEE.

To the Members of the Massachusetts Bar Association:

The MASSACHUSETTS LAW QUARTERLY for July, 1924, contained a reprint of the report of a committee of the American Bar Association on judicial salaries showing the relative salaries in the various state and federal courts throughout the country. From this report, it appears on page 4 that: the judges of the Supreme Court of the United States receive $14,500, Circuit Court of Appeals $8,500, and Federal District judges $7,500.

It appears, therefore, that the three Federal district judges in Massachusetts with the great and growing varied business of that court receive $500 less than the nine associate judges of the Municipal Court of the City of Boston, who receive $8,000, the chief justice receiving $8,500. The jurisdiction of the Federal District Court is equivalent to that of the Superior Court and the District Courts combined, together with occasional service on the Circuit Court of Appeals. All this growing Federal business is handled by three judges with the assistance of United States Commissioners in preliminary criminal work.

The bill before Congress, numbered Senate 3363, proposes a salary of $10,000 for each district judge with a sliding scale for an increase of $500 for each 100,000 excess of population over 2,000,000 in the district with a maximum limit of a sum $1,000 less than the salary of the circuit judges for the circuit in which the

district is situate. This provision would make the maximum limit under this bill for the districts in the first circuit $12,000, whatever might be the increase in population of the district. It also proposes to increase the salaries of the associate justices of the Supreme Court of the United States to $20,000 and of the Chief Justice to $20,500. The salaries of the circuit judges in the First Circuit are raised to $13,000.

We are informed that this bill has been carefully prepared after conference with leaders of the Senate and House. With the growing amount, variety, and importance of the jurisdiction of the Federal Courts, we believe that the present salaries are so clearly below what they ought to be that we recommend a vote of the Association supporting the bill before Congress above referred to.

The following new members were admitted by the Executive Committee during the year.

List of New Members Admitted in 1924.

Walter D. Allen, 314 Main St., Worcester, Mass.
Jacob Asher, 390 Main St., Worcester, Mass.
John M. Barnes, 14 Central Ave., Lynn.
Michael J. Batal, Bay State Building, Lawrence.
Chester S. Bavis, Court House, Worcester.
Harvey H. Bundy, 60 State St., Boston.
Henry B. Cabot, Jr., 1 Federal St., Boston.
Frank W. Campbell, Barristers Hall, Boston.
Sheridan R. Cate, 24 North St., Pittsfield.
Fred W. Cronin, 340 Main St., Worcester.
Francis H. Cummings, 1 Federal St., Boston.
Frederic J. DeVeau, 60 State St., Boston.
Francis Henshaw Dewey, Jr., 311 Main St., Worcester.
Frederick J. Dillon, Municipal Court, Court House, Boston.
John Donna, 24 North St., Pittsfield.
Wayland F. Dorothy, 6 Beacon St., Boston.
Lawrence B. Evans, Cosmos Club, Washington, D. C.
W. Sidney Felton, 1 Federal St., Boston.
Stanley E. Gifford, 53 State St., Boston.
George H. B. Green, Jr., 60 State St., Boston.
Charles A. Hamilton, 390 Main St., Worcester.
Thomas J. Hammond, Northampton.
Eugene J. Harrigan, 1040 Exchange Bldg., Boston.

Harold H. Hartwell, 390 Main St., Worcester.
Herbert A. Horgan, 82 Devonshire St., Boston.
Frank M. Jablonski, 340 Main St., Worcester.
Richard E. Keating, 53 State St., Boston.
Chester W. Kingsley, 18 Tremont St., Boston.
Miss Marguerite Kimball, 122 Sumner Rd., Brookline.
Daniel C. Manning, 18½ Main St., Peabody.
Lowell A. Mayberry, Pemberton Bldg., Boston.
Thomas A. McDonnell, Chicopee.
William I. McLoughlin, 340 Main St., Worcester.
Edward Miller, 43 Tremont St., Boston.
Samuel Miller, 43 Tremont St., Boston.
R. Nelson Molt, 390 Main St., Worcester.
William A. Pew, Masonic Block, Salem.
John M. Raymond, 735 Exchange Bldg., Boston.
Arthur K. Reading, Court House, Cambridge.
George B. Rowell, 84 State St., Boston.
Louis Shaffer, 11 Beacon St., Boston.
John J. Siarkewicz, 340 Main St., Worcester.
Philip S. Smith, Court House, Worcester.
Jacob Spiegel, 294 Washington St., Boston.
Lucius E. Thayer, 60 State St., Boston.
Robinson Verrill, 1 Federal St., Boston.
Charles G. Willard, Brockton.
George Avery White, 390 Main St., Worcester.
Lawrence E. Yont, 6 Beacon St., Boston.

Respectfully submitted,

THOMAS W. PROCTOR, *President*
T. H. GAGE
PHILIP RUBENSTEIN
JAMES W. SULLIVAN
ROBERT C. PARKER
FRANCIS J. CARNEY
M. A. SULLIVAN
EDWARD T. ESTY
FREDERICK W. MANSFIELD
E. E. BLODGETT
FRANK M. FORBUSH
JAMES J. KERWIN
F. RACKEMANN
HORACE E. ALLEN
CHARLES B. RUGG
E. A. MACMASTER
EDWIN G. NORMAN
HAROLD S. R. BUFFINGTON
WILBUR E. ROWELL
FITZ HENRY SMITH, JR.
HOMER SHERMAN
FRANK W. GRINNELL

THE VOTE OF THE ASSOCIATION.

After the report was read, on motion of Hollis R. Bailey, Esq., duly seconded, it was voted without dissent that the recommendation of the executive committee [relative to Federal judicial salaries] be adopted.*

ABSTRACT OF TREASURER'S REPORT.

RECEIPTS

Balance as of November 9, 1923		$2,565.83
Interest		120.71
Dues for 1923—12 (one check for $6)		61.00
Dues for 1924—828 (one check for $6)		4,191.00
Dues for 1925—2		10.00
For Dinner Tickets (for Dinner to the Federal Judges)		845.00
From Fall River Bar Association (Share of Expense for Memorial Meeting for Judge Morton)		20.00
From Boston Bar Association (for same)		20.00
		$7,833.54

PAYMENTS

The Itemized Expenses in the Report Amounted to		$4,889.75
Balance on hand November 20, 1925:		
Checking Account	$554.98	
Deposit in Mechanics Savings Bank	2,388.81	
		$2,943.79

CHARLES B. RUGG,
Treasurer.

The report was approved, subject to audit. The Auditing Committee, Messrs. Forbush and Grinnell, subsequently reported the account to be correct. The thanks of the association are expressed to Mr. Rugg for his services as Treasurer during the past five years.

REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

The Committee on Judicial Appointments has little to report beyond the fact that they have actively considered the vacancies on the Benches, and have held meetings as occasion required, with resulting advices to His Excellency, who has graciously acknowledged our efforts to be of assistance.

It may be of interest to add that at one of our meetings the Committee voted unanimously that at least in the case of the Supreme Judicial Court the age limit of sixty years should not be allowed as a determining factor, and that it might well be wiser to

* Copies of that part of the report and vote were subsequently sent to each member of Congress.

obtain relatively few years' service from a man whose qualifications were amply proven than a longer probable term from a younger man whose judicial qualities had not been so proven.

These advices, offered to His Excellency, were followed by the appointment of Mr. Justice Wait.

FELIX RACKEMANN,
Chairman.

REPORT OF THE GRIEVANCE COMMITTEE.

Three complaints were pending before our committee at the time of our last report.

In one case, the complaint has been withdrawn.

The second matter has been the subject of considerable investigation, which will doubtless result in a hearing at an early date.

Within a few days, we have been notified that the Executive Committee has authorized us to go forward with disbarment proceedings in the third case, that of George E. Clough, of Palmer.

Disbarment proceedings against William J. Reilly, of Northampton, and Abraham Goldberg, of Lynn, originally recommended by this committee, are now pending in the courts in charge of attorneys representing the Attorney General.

John F. McKay, of Brookline, who was a member of the federal, but not the state, bar, has been disbarred in proceedings brought by the United States District Attorney, following a hearing before this committee and our report and recommendation of disbarment.

More or less complaints which appeared unfounded have been dropped by complainants after conferences with the Secretary of the committee; and, in quite a number of cases complainants have been referred to the civil courts, where it was apparent that they were attempting to use the committee as a collection agency.

At a meeting of the committee held November 15, 1924, five complaints were dismissed, one was held pending the result of a civil suit; and five are now under investigation. Some, if not all, of the pending cases will require hearings at an early date.

As Chairman, I wish to publicly express once more my deep appreciation of the time and effort freely and efficiently given in the work of the committee by the Secretary and other members.

Respectfully submitted,

FRANK M. FORBUSH,
Chairman.

COMMITTEE ON LEGISLATION.

The report of this committee was printed in the QUARTERLY for August, 1924. The report was read and accepted.

COMMITTEE ON NOMINATIONS.

The report of the Committee on Nominations as printed on the back of the notice of the meeting was read and accepted, and the secretary stated that no other nominations had been received. A ballot was then taken for persons thus nominated for: president, vice-presidents, secretary, treasurer and Executive Committee, and they were declared duly elected as shown by the list printed herewith on the first page in this number of the magazine.

REGISTRATION OF DISBARMENT.

MR. GRINNELL (Secretary). Mr. President, in the QUARTERLY for August there was printed a letter which I received from the secretary of the American Bar Association, explaining a plan which they are following out of having a registration of disbarments in the hands of the secretary of that association, so that there would be a sort of central clearing house of information for members of the bar of different states, which could be applied to when necessary to find out whether somebody had been disbarred before he could be admitted in another state. That letter requested me to refer the matter to the association. It seems to me, rather than to take up the time of this meeting, it is a matter which can be referred to the Executive Committee for consideration.

A MEMBER. I so move.

THE PRESIDENT. It is moved that the suggestion of the American Bar Association as to record of disbarments be referred to the Executive Committee for consideration.

[The motion was adopted.]

ELECTION OF PRESIDENT COOLIDGE AS AN HONORARY MEMBER.

MR. WHITMAN. Mr. President, as a life-long Democrat it gives me great pleasure to propose for honorary membership in this association, Calvin Coolidge, Esq.

THE PRESIDENT. He is, I am informed by the secretary, a regular member of the Massachusetts Bar Association. Is that motion seconded?

[The motion was seconded.]

THE PRESIDENT. The motion is that we should make Calvin Coolidge, Esq., of Northampton, an honorary member of the Massachusetts Bar Association. Are you ready for the question?

[The motion was adopted unanimously.]

The secretary subsequently notified President Coolidge and received the following letter:

THE WHITE HOUSE
WASHINGTON

DECEMBER 10, 1924.

MY DEAR MR. GRINNELL:

Thank you very much for your kind letter of the 8th. I appreciate the action of the Massachusetts Bar Association in electing me an Honorary Member, and I trust that when opportunity offers you will express to the members my thanks.

Very truly yours,

CALVIN COOLIDGE.

FRANK W. GRINNELL, *Secretary*,
Massachusetts Bar Association,
60 State Street,
Boston, Massachusetts.

ADVERTISING BY BANKS AND TRUST COMPANIES.

THE PRESIDENT.—Next in the order of business is the discussion of Advertising by Banks and Trust Companies. In just what form, Mr. Grinnell, does that appear?

Mr. GRINNELL (Secretary).—Perhaps a word of explanation may clear the air a little. And, by the way, in connection with this meeting we felt that it might be of assistance if some of the representatives of banks and trust companies were present as listeners or to take part in the discussion. Accordingly several gentlemen were invited, and I think there are four or five representatives of different banks and trust companies present, and one representative of the American Bankers Association. We are glad to welcome them here.

The reason this matter came up is that last winter a bill was put in before the Legislature, as I remember it, to put all the banks and trust companies in jail who indulged in excessive advertising. The subject was taken up by the Committee on the Amendment of

the Law of the Boston Bar Association, and a bill was drafted which was printed in the QUARTERLY for May, providing that the matter should be placed in the control of the Supreme Judicial Court. That bill was reported by the Judiciary Committee and rejected in the House. The bill was subsequently printed with an explanatory statement by Mr. William G. Thompson, who was largely instrumental in drafting it after discussion with a number of persons interested. It seemed likely that the same question would come up before the Legislature again, and it is a matter on which members of the bar are continually expressing themselves. I receive letters on the subject from time to time. Accordingly we thought that it might clear the air if we gave members of the bar and others an opportunity to talk about it. I will read the bill as submitted by Mr. Thompson's committee. It was as follows:

> "To amend Chapter 221 of the General Laws by adding the following new section:
>
> "Sec. 46a. No corporation authorized to act as executor, administrator, or trustee in this commonwealth, shall solicit employment in any of said capacities either by advertisements of such a character or by such other means as would, if employed for a like purpose by a member of the bar, be a violation of the standards of professional conduct recognized and enforced by the courts of this commonwealth. The attorney general may, upon the relation of any bar association incorporated in this commonwealth, bring an information in the nature of a bill in equity to enforce the provisions of this section against any corporation violating the same."

That bill was defeated in the House. Whether there is sufficient occasion for legislation on the subject I do not pretend to say. I think it is possible that a conference of some kind, or a discussion of the subject like this between members of the bar and representatives of the banking institutions, may produce some results.

THE PRESIDENT.—We should be glad to hear from any member of the bar or anyone who has to do with banks.

MR. BAILEY.—Mr. President. This matter, gentlemen, has been the subject of consideration in New York City by the Bar Association of the City of New York, by the Chamber of Commerce of New York, and by the committee of the American Bar Association known as the Committee on Commerce, Trade and Commercial Law. Legislation has been procured in the State of New York regulating the matter there, and, as I recall the statement which I have heard in

New York, the legislation goes rather far in prohibiting trust companies undertaking to do what amounts to legal business in the matter of drafting wills and work of that kind. I cannot give you the details of it, but I know that Mr. Julius Henry Cohen of New York, who is a member of this committee of the American Bar Association and is counsel for the New York Chamber of Commerce, has been active in the matter, and they have very considerably restrained the trust companies in New York from not only advertising but doing the business that properly belongs to lawyers, the argument being that the relation of attorney and client is a confidential relation and cannot well be performed by a corporation acting for an individual.

THE PRESIDENT.—Mr. Denio, we should all be glad to hear from you on the subject.

MR. DENIO.—Mr. President, the bankers who appear I think came to listen to the discussion and possibly answer any questions that we could which would lead to a proper consideration of the subject under discussion. In regard to the last speaker's remarks, of course the statute we already have in the Commonwealth with regard to practising law goes considerably further than the New York statute to which he refers. I think we believe the trust companies and banks here in Massachusetts need much less law than they do in New York, but I am open to correction on that. However, Mr. Mershon, Secretary of the American Bankers Association and a member of the Committee on Corporations and the Bar, who has been working on this subject with the American Bankers Association for over twelve years throughout the country, is here today, and perhaps he could answer on that later if you cared to hear from him.

THE PRESIDENT.—We should be glad to hear from him when you have finished.

MR. DENIO.—With regard to the bill that is presented for consideration, it seems to pertain to the advertising by trust companies rather than to the practice of law. I think that the Massachusetts bankers have no desire to practise law, and we are very glad to have the statute in the form in which it is, which prohibits us from doing it, because we don't attempt to give legal advice to our customers, and we don't intend to. I think most of the trust companies and national banks have fiduciary officers today rather generally, and practically uniformly employ the counsel that a testator or a client does in the handling of the estates that

happen to fall in their lap, as distinguished from somebody else's lawyer. This seems to us a very proper procedure and one that enables us all to work together. Our feeling has been, and is, that the field is an open field, that we do not want to get into the legal business and there are a great many lawyers who do not care to get into the purely business and administrative end of administering estates, and it seems as if there must be some method of two intelligent organizations working together for a friendly and constructive result in this, and possibly without further legislation. That is our whole attitude on it. If there are abuses which cannot be corrected outside of legislative process I think you will find the Bankers Association will be very glad to co-operate to produce legislation to correct those abuses if it cannot be done within our own ranks.

There has recently been formed, since this bill was drawn and Mr. Thompson was working on it, an organization of the corporate fiduciaries of the Commonwealth, and the machinery is now well under way for an organization similar to your Bar Association here, which should be able, it seems to us, to cope with the indiscretions of individual members in the same way that your Bar Association copes with indiscreet performances on the part of your own members. I believe that is a matter for your consideration, as to what we are trying to do toward remedying an evil that we know has existed and that we are doing our best to correct.

If you care to hear Mr. Mershon he will be very glad to talk to you, but I think we would be glad to listen to the feeling of the members of the bar quite frankly expressed,—I mean, we would not let our presence here prevent any franker expression of opinion than if we were not here. If desired, we would be glad to retire, so that they can express themselves.

MR. GRINNELL (Secretary).—Mr. Chairman, perhaps it will open up the discussion still further to read a letter which is an illustration of the kind of comment that lawyers are apt to make. This was made in a letter to me, and was printed as a supplement to the discussion of this act last May.

I received the following communication and enclosure, which illustrate the problem:

> "DEAR SIR:—I enclose advertisement cut from a morning paper which is typical of the scare-head advertisements which have appeared recently in the papers.
>
> "At this writing I can recall two instances where a

trust company as trustee has lost substantial amounts. In one instance the sum of $10,000 on a forged mortgage and the other a much larger amount on unwise investments.

"I presume that if a firm of attorneys or group of attorneys inserted an advertisement in the paper setting forth that a trust company had lost a substantial amount on account of the negligence of its employees and setting forth the advantages of an individual as executor and trustee and the disadvantages of the trust company such action would be considered unprofessional.

"The care of estates is a legitimate field of activity for the legal profession. If the trust companies are allowed to compete in this field why should not the same standards of ethics be applied to both the trust companies and the legal profession so that the legal profession may meet the competition on equal terms?"

The enclosed clipping from a Boston newspaper was as follows:

"FIFTY THOUSAND DOLLARS LOST TO THE RIGHTFUL HEIRS.

"*An aged Trustee, mentally and physically unable to care for* the estate left in his hands, objects to being removed in favor of some other member of the family, and in consequence more than $50,000 was lost to the rightful heirs.

"*At his death a family settlement was made and after careful* consideration the————Trust Company was appointed Trustee of the Estate. Now the beneficiaries are receiving their payments at regular intervals and like many who have suffered by mistakes they have appointed the———— Trust Company to carry out the provisions of their wills.

"*When you appoint the————Trust Company the executor* or trustee of your will, you give your heirs protection founded on financial responsibility, experience, impartial view-point, assured existence, sound financial judgment, and legal knowledge.

"*It has taken care and wisdom to build your estate—it will require the same qualities to preserve it—appoint the ————Trust Company your executor.*

———— TRUST COMPANY,
Member Federal Reserve System."

The full-page advertisement of the "Trust Company Division of the American Bankers Association" on page 10 of "The American Review of Reviews," and that in the "World's Work", for

April, 1924, seems open to criticism in the light of the foregoing discussion.

That picture, as I remember it,—I think I have a copy of it here somewhere—was of an individual trustee with his head on his hands in a court room before the judge, after failing, and the moral of it was, "Appoint the trust company, or the bank, trustee, and get rid of this kind of thing." A good many of the members of the bar feel that trust companies should not invite, by advertisements of their appointment as executor or administrator, any more than individuals do. Others feel that if they are to advertise for that kind of business which the Legislature has authorized them to perform, it is not proper that they should be throwing bad odor on legal profession in general by advertisements of the character which I have just read accompanied often by cartoons which indicate that some individual member of the legal profession, who has made a mess of it is typical of the profession as a whole. That, so far as I can gather it, is the feeling of members of the bar which has come to the surface in this appeal for legislation at the State House and in the discussions.

If anything is to be done, certainly a criminal penalty is not the way to go about dealing with a thing of this kind; it is too drastic a remedy. Whether there should be any legislation at all is another question. I should suppose that some of the advertisements, such as these cartoons of the legal profession, and these advertisements of individual cases of mismanagement of fiduciary matters, would, in the course of time, be stopped as a matter of course by the trust officers' association which has been referred to, and yet the fact that they are issued by the Trust Company Division of the American Bankers Association attracts attention and comment.

MR. STODDARD.—Mr. Chairman, I am glad that I am from the American Trust Company and not from the ———— Trust Company which was mentioned in the advertisement. I am interested as a trust officer and also in the advertising policy of my bank.

There has been reference made by Mr. Denio of the Old Colony to the Corporate Fiduciary Association. That association is something under a year old. I think it was started in May, last. It is a voluntary association in which the principal active members are the Boston trust companies and the national banks in Boston which do a fiduciary business. It comprises practically all of them.

I personally don't think that legislation is the way out of this, because you put a law on the books to cure an evil which is probably

not a general evil. The number of trust companies in Boston which would advertise as the ———— Trust Company did is very small. Now I would like to make this suggestion following out Mr. Denio's suggestion; that this Association and the Boston Association, if they so desire, sit in conference with representatives of the Boston banks and trust companies,—that does not include Massachusetts, however, although we have members outside of Boston,—sit in conference with the Corporate Fiduciary Association, to discuss this matter and see what is to be done. The reason I make that suggestion is this: that the second article of the Corporate Fiduciary Association states this:

> "The objects of the Association shall be to promote the interests and general welfare of its members by according through meetings of the Association and otherwise opportunities for discussion and consideration of questions affecting them in their fiduciary capacities, and to further the personal acquaintance of the representatives of its members. The Association shall be advisory in character, and shall have no power to bind its members to any action or conclusion which is not provided for in this instrument."

And the things provided for in the instrument are the usual things about the election of officers and holding meetings. In that way, better than by going to individual banks, could you bring to bear the influence of such a meeting and clearing of the air, to use Mr. Grinnell's phrase, and you could help us in the association to do one of the things that we are established to do, that is, to set up right standards of professional conduct. We have not a disciplinary committee, and we don't want one, but if we have to have one we will have one.

I am speaking, and advocating this view, in a double capacity in a way. I am a member of the executive committee of the association. The association has not passed on this thing, and I am not speaking for the association in so suggesting. I have taken the matter up with my own organization, and that is the policy of our organization, the American Trust Company. We would be glad to join with the other banks through this association to talk this over round the table with the Massachusetts Bar Association, and if desirable with the Boston Bar Association, to see if there should be legislation or not, and if there should what there should be.

Mr. Blakemore.—Some years ago I published a small handbook on the law of wills, in which I outlined my views of trust

companies being named as executors of wills, and I received a very bitter letter from a man in Pittsburg, who told me that lawyers ought not to be made executors of wills because they were very likely to rob the beneficiaries. I replied to him that we had twenty trust companies in Boston, and that four of those had been looted and closed during the past year, and I thought the percentage of honesty among lawyers was at least as high as eighty per cent.

There is one feature of the matter that I think ought to be considered at this conference, and that is that the trust companies should be bound by the same rules as lawyers. I am told, and I believe on very competent authority, from those inside and outside the trust companies, that it is a common practice to buy their own bonds for estates. Of course if a lawyer sold to an estate his own property he would be the subject of disbarment, as I understand it. Last winter the president of one of these trust companies was in my office because I had objected to his account showing a loss from the purchase of worthless bonds, and I told him I was objecting to it not because the bonds were worthless but because I understood that they had bought those bonds simply because they were the transfer agents for that issue. We had some discussion on that, and he said no, that they were transfer agents for another issue of the same company, but that some other trust company had obtained the transfer agency for these bonds on condition, which he said was a common condition but which he did not think was quite right, that they buy a block of the bonds. It is that kind of thing, it seems to me, that a friendly conference can adjust, and protect the beneficiaries—after all, the beneficiaries are the ones who should be protected—from the purchase of these bonds that are promoted by trust companies and sold to their own estates.

Mr. Rand.—Speaking for the national banks in a way, the Atlantic National Bank especially, because I believe as yet they have not been mentioned, we heartily endorse any project for a conference, anything that will better the feeling and make more efficient the co-operation between the lawyers and the bank. Our bank always has made a practice in all these fiduciary cases, of using the lawyer of the family, of the deceased, of the trustee, and we find those who say that the law work is done more efficiently, that we speak correctly. We are heartily in favor of that. We are heartily in favor of the law that now is on the books prohibiting a bank from doing legal work for hire for its customers. As to the advertising of its function as a trustee, that can be done properly and should

be permitted to be done. It is educational, and it is good. If it is done improperly it ought to be stopped, and that should be a matter of conference and not of statute.

MR. STODDARD.—Mr. Chairman, may I add one thing that I forgot, but that the last speaker has reminded me of? I am not a lawyer, but I raise this point. Supposing this law is passed and applies to trust companies. It does not apply to national banks. I doubt if you could pass a state law prohibiting national banks from doing something which they were permitted to do. On that ground would it not be a question whether that law would hold at all?

MR. ALBERT M. CHANDLER.—Mr. President, I have not heard the whole discussion, but I disagree with the remarks of the speaker just before the last one, that the banks should be allowed to advertise and the legal profession should not. It seems to me that it is a case of where for the public good both sides of the question should be presented to the public. Now, I am not going into the question of the advantages or disadvantages of corporate fiduciaries, or the advantages or disadvantages of individuals. There are advantages on both sides, and we all know it. The banks know it. Lawyers know it. The public know it. But why should one side of that question be presented week after week, in some cases fairly and in some cases not fairly, to the public, and the other side of the question, namely, the advantages of individual fiduciaries and the disadvantages of corporate fiduciaries, not be presented at all to the public? I think either both sides should be presented or neither side in that public manner.

MR. METZLER.—Mr. President, I am not at all familiar with this subject, and I did not know until Mr. Grinnell read that recommendation by Brother Thompson, but it does seem to me that this is a very vital question that the attorneys of this Commonwealth should have in their minds. And not only the question of wills and work of that capacity, but banks and trust companies are holding themselves out to draw trust agreements under bonds, and various things of that character. I think it is a time when we can properly speak of this matter, and properly think it over. It is a reflection somewhat upon the attorneys, and you hear it all about. I am very friendly with a great many banks and I would like to have this matter referred. As I understand, Mr. Chairman, the recommendation that has been made by Brother Thompson and his committee will fail if nothing else is done in the Legislature. Is that the understanding?

THE PRESIDENT.—So far as we are now concerned it is an open discussion for anyone present. What the result may be as to the particular measure to which you have referred I don't know.

MR. METZLER.—What I ask is that perhaps before the meeting adjourns we would like to have it referred back to that committee for further action.

THE PRESIDENT.—That will be a matter for a motion. Any further discussion?

MR. THOMPSON.—I have come in late, and therefore I don't know what has been said for or against this bill that has been referred to as my bill. It seems to me, however, that I am safe in making a few remarks about the subject.

We had a committee of the Boston Bar Association last year of which I was chairman, and the immediate cause of our giving attention to this matter was a bill before the Joint Judiciary Committee, making it a criminal offense for a trust company to advertise their capacity and desire to act as executors and administrators and trustees. Of course that seemed to the committee impossible. If the trust committees are permitted to do this it seems a little difficult to see why they should not be permitted to advertise that they do it. On the other hand, there seem to be two rather serious classes of objections to the widespread advertisement and especially to some features of it. Those two objections appear to me to be these: First, an economic objection, whether on the whole it is to the advantage of the public that people shall be, in the first place, induced to make wills who would not otherwise have made them,—no matter what they put in their wills, whether a person should be induced not to permit his property to descend according to law; and second, whether they should be induced to make trusts, which will be of longer and longer duration, human nature being what it is, and tie up such an enormous amount of property for a long period there, whether it is to the advantage of the public that these large masses of personal property shall get into the control of a comparatively few trust companies or banks, with all that that implies, the voting powers, the power over the industry represented by the stock, etc. That is a large economic question, and on that I think there is a good deal of feeling in the Legislature and among the people at large that it is dangerous, something like the feeling that I suppose caused the corresponding statute to restrict the tying up of real estate for indefinite periods. Then there came a second class of objections, which were more or less peculiar to law-

yers, and which were very strongly advanced in the Legislature. We could not dismiss those objections as frivolous or as insincere. They were obviously neither one nor the other. The effect of it is said to have been, and we rather believe that the effect of this advertising has been, to take away from a great many lawyers opportunities, in the first place, to draw wills (and I will explain how that happens in a moment), and in the second place to act as executor, administrator or trustee under wills. The lawyers naturally feel, "Why, if trust companies are permitted to advertise their capacity in the most skilful form and we are not permitted to advertise because it is against the ethics of our profession to advertise our capacity in any direction, it is very unfair. If they let us alone we would be satisfied. When they advertise, especially when in some instances they reflect on the characteristics of lawyers, on the faithfulness of lawyers, it is very unfair."

It is for us to deal only with the second class of objections. It is probably none of our business as lawyers to deal with the economic considerations involved in this practice. Nevertheless it should be said in that connection that we have gathered from the remarks of the representatives of the companies who are present that a very large amount of personal property is held already under wills brought about by these advertisements; and we also learned (there was no concealment at all on the part of the companies, they treated us with great fairness) that although they did not employ their own lawyers, and could not by law, to draw wills for persons who were brought into their offices by these advertisements, yet frequently the actual situation was that men or women would come in who had no lawyers, and the trust officer would say, "Better go to your own lawyer to have this will drawn," and they would say, "We have no lawyer," and they would beg the trust officer to recommend some lawyer to them. The natural result of that situation was that the lawyer who was recommended was somebody known, one of the small class of lawyers known, to the trust officer or to the counsel for the trust company, and with the best intentions in the world those lawyers would know where the business came from and would be naturally inclined to draw wills which would satisfy the desire of the trust company and have the trust company act as executor and trustee.

We felt that something ought to be done to cure that situation, and that we should draw a bill something like this one here. I don't attach great importance to the phraseology, I am not at

all sure it is the best bill that could be drawn, but the purpose of it is to put lawyers and trust companies on substantially the same basis as far as advertising for business is concerned. True enough, acting as executor or trustee is not strictly a professional business, any more than acting as a storekeeper is. None the less it is a kind of business which is affected by a public interest. It seemed to us that the police power controls the right of anybody to act in the capacity of trustee or executor, and if there is to be advertising the Legislature has a perfect right to lay down some restrictions. The lawyer cannot advertise, according to the traditions of his profession. There is such a public feeling against it in the bar that a lawyer would be a marked man who undertook to advertise at all. We have constant complaints in our Bar Association about a form of advertising done by a very small minority in the bar. Therefore it would seem, if we could enforce this statute, the Supreme Court would do what it has never done yet, put into definite form this age-old tradition against advertising by members of the bar, define its limits, settle what a lawyer can properly do and cannot properly do in the way of advertising, and then hold the trust companies and banks up to the same standard, and not permit individual lawyers, but only the Attorney General on complaint of some bar association, to take action, and safeguard the matter in that way, and we should have made a reasonable attempt to cure one part of the alleged evils of this situation. I don't say they are evils, I say they are alleged, and it is very strongly felt that they are evils by large numbers of members of the bar.

As to the other aspect of it, whether it is desirable to permit either lawyers or trust companies to advertise in a manner which will increase the number of wills, increase the number of trusts, concentrate larger and larger amounts of personal property in the hands of trustees, either corporate or individual, that is a very serious economic question, which I dare say the Legislature will be called upon to deal with sooner or later. It is a broad question of public policy.

Mr. Mason.—Mr. President, I am here perhaps in a double capacity. I am here as a member of the Association, but I am also an officer in a trust company. I don't have anything whatever to do with the advertising. But I assume that many of the members of this Association may be interested in the trust companies as officers or directors. At any rate, I speak of that because it may explain my position in part.

I dislike very much to see this matter argued from what seems to me the trade union standpoint, that is, its effects on the members of the bar. If we cannot justify our position before the public, and show by our acts that we are worthy of employment, why, let the public get somebody else. If the public needs protection from misleading advertisements, perhaps false and misleading advertisements should be checked, but it seems to me that we don't get anywhere by having a trust company say such an individual or such a member of the bar spoiled a certain estate, and we don't get anywhere, either, by saying that a trust company mismanaged an estate. Both statements may be true, but neither represents the general situation. By all means suppress false advertising, but avoid as far as possible government by mere meddlesomeness.

MR. WHITMAN.—I have been amused at this suggestion about advertising, because so far as any lawyer does anything in the legal line he usually gets advertising. The difference between the lawyer and the trust company is the trust company pays for its advertising and the lawyer does not. If you will take up any morning paper giving a list of cases on trial, you will find the lawyers are mentioned, and people read it. I daresay almost everybody here who tries cases has had people say to him, "I saw in this morning's paper you were trying a case," and I have known cases, and I dare say a good many of you have known cases, where a case of importance or public interest was being tried the lawyers on the other side were not unwilling and sometimes took a little extra care to see that the reporter got their names in the paper, all of which is extremely useful. I know nothing that prevents advertising under our law, except in divorce matters, and I have also felt that promiscuous advertising might do us more harm than good and that we had better not try it.

The underlying principle I think in this thing is what Mr. Mason has just suggested, this trade union business. I have had something to do with trades unions. On one occasion I was incautious to suggest the union was somewhat selfish in trying to get business into its own ranks, and the reply came quick as a flash. "Well, what is your bar association but a trade union and trying to hog all the business into its association?" And with the sort of bill that is here, I don't know what answer to make to that.

You will recall, Mr. President, that at a meeting of the Bar Association last spring this matter was brought up, and one gentleman spoke of the danger to the bar not only of the trust companies

but of the collection agencies, who in the simple matter of collecting bills frequently got hold of some very juicy and important cases that lawyers ought to have, and I noticed the enthusiasm with which that suggestion was received, and I believe it was the suggestion of Mr. Thompson that perhaps his bill might be amended so as to include that also. I think we ought to be very slow in representing to the public by advocating any bill of this kind that we are a trades union, trying to limit the work so that all should come into our hands and not into somebody else's who is quite as able to handle it as we are.

MR. MCINTYRE.—Mr. President, it is manifest to me as the discussion proceeds that this is a matter for conference between the Bar Association and the Corporate Fiduciary Association. Is that the name of it?

MR. DENIO.—Yes.

MR. MCINTYRE.—And I think it would expedite matters a great deal if a committee of conference was arranged between the two bodies. I move that the President be authorized to appoint a committee of five to meet a similar number from the Corporate Fiduciary Association for the purpose of conference, and at a time to render a report to this Association of their views on this matter, which may be a solution of it.

MR. MERSHON. (Secretary of the Trust Company Division of the American Bankers Association).—I believe I can add something to this discussion.

THE PRESIDENT.—Surely. We will be glad to have you.

MR. MERSHON.—I have been for the past eight years acting as secretary of the Committee on Co-operation with the Bar of the Trust Company Division of the American Bankers Association. I have traveled in at least forty states and discussed this matter with trust company and banking groups as well as groups of lawyers.

I want to correct Mr. Blakemore, before I forget it, in regard to trust departments throughout the country buying securities from their own bond departments. That has been done in some cases. It may be done now in a few cases. We are against it. I have worked on that particular proposition in almost every state in the union, I have discussed it with trust company officials from the Atlantic to the Pacific, and the general attitude of trust company people now is against that practice.

On June 15, 1923, I was asked to give a talk before the New England Bankers' Convention at New London and I want to skim

through it and give you a digest of it. I want to leave copies with the chairman and the secretary. It is entitled The Prevention of Unnecessary Legislation:

> "In November, 1916, a joint committee of the Chamber of Commerce of the State of New York, and of the New York Bar Association, prepared and adopted a report containing a set of rules for the prevention of unnecessary litigation.
>
> "After outlining the object of the rules, the report stated that 'Litigation may be said to be unnecessary if it can be prevented by the exercise of reasonable care'. It further stated that 'Care at the source is, of course, most effective'.
>
> "It is the application of this principle in legislation as distinguished from litigation to which your attention is earnestly invited."

After analyzing that thought, going a little further down in the talk, I referred to an address which was made by Marquis Eaton, Esq., of the Chicago Bar several years ago in discussing The Relation of the Trust Company to the Lawyer, and to his view-points, and then I called attention to the action of the convention in 1918 of the American Bankers Association, at which this matter was taken up and a special committee on co-operation with the bar was authorized and came into being. A little later, in 1919, you gentlemen will probably remember, the American Bar Association met in Boston, and they discussed this question. They adopted, following their discussion, this resolution:

> "RESOLVED, that it is the sense of this meeting that it is in the interest of society that the intimate and direct relationship of attorney and client shall be preserved, and that corporate or lay practice of law is destructive of that relationship and tends to lower the standard of professional responsibility;
>
> "RESOLVED FURTHER, that trust companies, while performing proper and legitimate functions of a business and fiduciary character are not constituted or organized for the purpose of furnishing legal advice to clients—drawing wills or furnishing legal services;
>
> "RESOLVED FURTHER, that the efforts of the Trust Company Section of the American Bankers Association to eliminate evil practices on the part of trust companies be encouraged and the effort to co-operate with the bar be cordially welcomed;
>
> "RESOLVED, to that end, that we recommend to state and local bar associations that they bring to the attention of the Trust Company Section of the American Bankers Associa-

> tion any evil practices of trust companies or bankers of which they are aware, in order that the bankers' organization may, like the lawyers' organization, purge its ranks of wrong doing or error;
>
> "RESOLVED FURTHER, that a special committee of six be appointed"—

which was done, to prepare a definition of what constitutes practice of the law.

Under this resolution bar associations in different parts of the country have been writing to the New York office in reference to the advertising and practice of trust companies, and I can say to you, gentlemen, that as a result of that expression on the part of bar associations we have gotten our members who have been reported to us to co-operate in this movement one hundred per cent.

I want to call attention to an address which was made, and which is referred to in this little talk, by Julius Henry Cohen, whom I claim as one of my good friends in New York City. It was delivered at the San Francisco Convention I think one or two years ago. It has this reference:

> "Mr. Cohen told the delegates of our meeting together about five years ago when we discussed the conflict between trust companies and lawyers. 'From that day to this', said Mr. Cohen, 'I can testify as a witness upon the subject that we have had a most hearty co-operation from the Trust Company Section of the American Bankers Association'."

The work which I have been doing on behalf of the trust companies and the bar is just this: I have been drawing for these men a straight line, on one side of which falls legal practice and on the other side of which falls the business administration of estates, and I have tried in every way, and successfully in many states, to have the trust company get that view-point clearly, so that they would not offend the bar.

As for the advertisement which your secretary called attention to a while ago, I can supply it for you. It went over my desk, as does every one of those advertisements before it is published. There is no offense or reflection in that advertisement intended to the bar, and if we are in error we want to know it, because we want to work with you. Every one of our advertisements is based on actual, concrete cases. They come into our office from all over the country. There are the most pathetic cases of the mishandling of estates, not

by lawyers but by the son or the daughter or the wife, who knows nothing whatever of business or investments except that he or she bought a nice bond with a green or a blue or some other kind of a cover. It is the protection and the conservation of those estates that we are after, and in our advertising of the past four years you will note that we tell people to go to their lawyer, go to their lawyer, go to their lawyer. If the lawyer benefits by this by being appointed himself, if he is the kind of a lawyer who understands the laws concerning estates, if he understands how to make investments and to take care of all of the intricate matters in connection with estates, we take our hats off to him. We have protected and conserved that estate, and that is the thing we are after. Naturally we believe that the institution that has a perpetual charter, with its specialists in different lines, can take care of estates probably a little more satisfactorily than most individuals, because you gentlemen know that if you have an estate in your office and you die right in the midst of administering that estate sometimes the estate may suffer a little on account of your death. We have in our files in the New York office, comments from lawyers in all parts of the country as to the helpfulness of trust companies to them, not only when they were appointed and in managing estates, but when they were co-executors, or co-trustees, or engaged as the attorney for the estate.

If you want to shoot anybody at sunrise because of those advertisements, shoot me. I am the one that went before our executive committee five years ago and put up to them the proposition of a national publicity campaign to sell in a broad way to the people of this land the idea of the protection of their estates, and that in order properly to protect their estates they must first have a proper will drawn.

I am the fellow that has been developing throughout the country the thought of testing wills before death. The idea is, if one attorney draws up a will, have another attorney test it. If you don't like that I want you to tell me, because I am sincere about it.

I did not see until today the material which is published in this Massachusetts Law Quarterly for May, but I read it a little while ago and I don't understand some things which you have here. However, it may be that you don't want to give me the time to discuss this, but there are a number of points here, Mr. Chairman, which I would like to have an opportunity, if you have a special committee, of sitting down and discussing with them, because there is some misapprehension in regard to trust company practice in different

parts of the country. This advertisement[1] which you read, and which you have published here, Mr. Secretary, is a very poorly worded advertisement, and any advertisement of that sort, which is an offense to the members of this Association, published anywhere in Massachusetts, or any practice that is indulged in by any trust company or bank with fiduciary powers, if you will report it to us we will guarantee to straighten it out. We will go so far with our members as to tell them we don't want them as members of the American Bankers Association if they will not co-operate with us in this matter, and there is not a reputable trust company or bank that wants to be dropped from membership in the American Bankers Association.

Here is an illustration of the magazines in which we have been publishing our advertisements for the past four years, and you gentlemen would be amazed to know the number of letters which we have received from lawyers in different parts of the country asking questions which have come to their minds as the result of this campaign. I believe we have been definitely helpful to lawyers, not only in sending them business but in enlightening them with regard to fiduciary practice in many of its phases. This illustration[2] here which you call a cartoon and we call a drawing we paid $150 for. It jarred me a little bit to have you call it a cartoon, because a cartoon is a cheap slapstick sort of thing, and we don't indulge in that.

MR. SULLIVAN.—He meant a caricature.

MR. MERSHON.—I wonder if that is any better. Here is a case where this fellow went to Europe when he was charged with the handling of this estate, and he gave an answer over the cable. He became involved in a lawsuit as soon as he got home, and here he is sitting in the court. He is not weeping, but he is almost weeping. He has his lawyer defending him, and the lawyer on the other side is there defending the beneficiaries of that estate or trust. We felt that that was constructive advertising. If you men don't agree with me, tell me. We don't want to offend you.

Here (indicating) is another court room scene. The court appointed an administrator. That is a little talk in favor of the corporate fiduciary. I don't know just what the subject matter was there. "Your wife and your estate." Another one taken from a

[1] "Fifty Thousand Dollars Lost to the Rightful Heirs", an advertisement in a Boston paper.

[2] "Came Home and Stepped into a Law Suit", a full page advertisement of the Trust Company Division, A. B. A.

concrete case. (Indicating.) Here is another one, "A House Divided." There are two sisters living together in the same house, and they don't speak, and it was on account of some twist in the instrument. We are simply telling those stories of intimate family relationship in order to get people to have a safe and sane will drawn. If that is not helping the legal fraternity I don't know what is. I have been thinking all the time that it has been. Our committee on publicity has thought that we have been co-operating with the legal fraternity, and if we are wrong we would like you gentlemen to set us straight. "George Washington's Will and Wills of Today." Here is a little one. "It was not easy to talk with Daw about his will." You gentlemen as advisers of men and women know that it is not easy for men and women to get together and talk about these things, because the man has got some little twist in him and the woman has also, and when they talk about passing on their worldly goods and arranging their mundane affairs they just don't get together. "The maker of the will foresaw this problem." (Indicating.) Here is an actual case. Here is a young man with his mother going in to see the trust officer, and he wants this trust officer practically to break the will and give him some of the funds so that he can go into a wonderful rise in the market and get the new car that they want,—an actual case,—and the trust officer told him that his father foresaw that problem, the will undoubtedly was drawn by a lawyer, and the man sat down and went over the whole thing with him. If telling the people of the country those cases and getting men and women to act is not constructive work, please tell us.

Bringing wills up to date is another activity that we are working on and urging throughout the country. We are going along with the idea that we are actually co-operating and working with the legal profession, and this whole matter of advertising, which may be offensive to the bar here in Massachusetts, if you will lay it before me in my office I will guarantee that we will straighten out ninety-five per cent of the cases in question.

Mr. McIntyre.—I should like to renew my motion. The remarks of the gentleman who has just sat down only produce convincing evidence to me that this problem needs attention. The difficulty with lawyers is that we can't conduct a publicity campaign, the trust companies can. Now, is there any way of solving that problem? I move a committee of five be appointed. Mr. Stoddard has suggested we also invite the Boston Bar Association to co-operate in

this movement. I don't know just how that would be. We represent the Massachusetts today.

THE PRESIDENT.—Isn't it better to move to appoint your committee and leave that matter for conference, perhaps, with the committee, if such a committee is appointed?

MR. THOMPSON.—I second the motion.

THE PRESIDENT.—It is moved and seconded that a committe of five be appointed by the President to confer with a committee of the Corporate Fiduciary Association for the purpose of dealing with this subject of advertising,—and any other kindred subject, I suppose. Are you ready for the question?

MR. THOMPSON.—Mr. Chairman, before that question is put I should just like to make this suggestion. I was somewhat surprised at the suggestion of Mr. Whitman that a committee of the Boston Bar Association was engaged in an enterprise like making the bar a labor union. I don't think they are open to that suspicion. Of course that is perhaps a natural objection to any bill of this kind. We had that in mind. The analogy is however, not a true one. If any labor union were prevented from getting new members, doing anything to promote its interests, by statute, and the same prevention were not applied to its opponents, then you would have an analogous situation. We are not seeking to protect the bar, to build a close wall around the bar, but merely to prevent what seemed to us in some of its aspects an unfair advantage being taken of the bar, that is all. We were acting, as we supposed, not merely in the interests of lawyers, but in the interests of the public which the lawyers serve.

MR. BLODGETT.—I wanted just to make the suggestion that the motion does not cover all the matter that I think it should. There are trust companies that are not members of that association in the Commonwealth of Massachusetts. There are national banks that are not members of that association. Both of those, if possible, outside of Boston should be covered, and also the national banks throughout the Commonwealth. The motion limits it to a committee of the Massachusetts Association.

MR. CARROLL.—Mr. President, I am vice-president of the National Shawmut Bank. I am also an attorney, and I am on the executive committee of the Fiduciary Association. It is my suggestion that the motion go through as it is put. I believe there is no such organization of the entire trust companies or national banks doing this business in Massachusetts; that, further, the Corporate

Fiduciary Association is not formed for the purpose of compelling any members to act but merely in an advisory capacity; that therefore if this motion goes through as put, and we confer with the Massachusetts Bar Association, we can then work out some plan which will bring in to a conference all representatives of all banks and all trust companies doing this kind of business in Massachusetts.

MR. CHANDLER.—I would like to suggest an amendment which may be agreeable to the committee: that this committee also consider the question as to the status of the law relating to the practice of law in banks. I am not clear myself what may be the present law. But I know the practice varies among banks. We all know there is a great deal of legal work in connection with estates,—probate of the will, petition for instruction, and so on. Some banks do all that themselves, through a trust officer or otherwise, who is a member of the bank and who is a member of the bar also. Other companies do that by outside attorneys. I don't know but it would be wise from the standpoint of the public to have the law clarified, so that it shall be clear whether they are to do that work or whether they are not. I move to amend that the committee be given the power to go into the question as well as the other.

THE PRESIDENT.—There is an amendment now, seconded, before the meeting, and that is that this committee should deal with the practice of the law so far as it is practised by trust companies and banks, if I have stated it correctly. Is that it, Mr. Chandler? What is the pleasure of the meeting with respect to that amendment?

MR. MCINTYRE.—I have personally no objection to having that considered, though I presume it would greatly add to the work of the committee. I am not sure whether it is not pretty well understood.

THE PRESIDENT.—Those who are in favor of the amendment will say Aye, those who are opposed will say No; the Ayes seem to have it. Is the vote doubted? If it is not, the Ayes have it, and the motion is amended.

MR. RACKEMANN.—Mr. President, I had not intended to say anything at this time, but I don't quite like to let this meeting dissolve without expressing one thought which has come to me here in view of the course which the discussion has taken. I quite agree with Mr. Thompson that with the economic side of the problem, which I think we must all recognize, this Association has no concern. We can dismiss that. With the ethical side I think we have a very distinct concern, or if we have not we ought to have.

But I dislike very much to leave here if it is going to be understood that the principal objection or the only objection of the Massachusetts Bar Association to the advertising by banks and trust companies is on the ground that it is unfair competition. That is the last ground I, as a member of this Association, want to put it on, and I want to protest against its being put on that ground. If I am right, from the beginning of the fiduciary relationship in the law it has been a settled rule that it was an unethical and unworthy thing for a professional man, a lawyer, to advertise himself in any way or to seek employment in any way, and I suppose that law is in force in Massachusetts at this moment to such an extent that if it be a question in the Probate Court as to who shall be appointed a guardian of a minor, and there are two persons suggested, and it appears to the court that one of them has sought the employment by letter, by telephone, by personal solicitation, or by causing report to be made of his extraordinary financial responsibility or his extraordinary abilities in other directions, he would certainly not be appointed by the court. The question I think exactly is this: Assuming that to be the rule, assuming, as we must, that there must have been a reason for the rule recognized by long generations and recognized today, where is the ground for saying that what is absolutely improper for the individual to do is nevertheless perfectly proper for the trust company official to do or the trust company organization to do? What bothers me most about it is not the idea that the trust company may get a job that I might otherwise have had. That I can stand perfectly well. That does not worry me at all, and I would be sorry to have this Association stand on that ground. What worries me is this. I don't think that the standards of the bar are being kept any too high as it is. I don't think that the general opinion of the community regarding the bar is staying as high as I would like to see it. Now, when our young man comes into the bar and he is told that certain things are unethical, and always have been so considered, and that his father, the judge, and his grandfather, the chief justice, never would have thought of doing them, and he is brought up on that plane, and then he sees that very eminent gentlemen in charge of corporations do the very thing that we taught him he must not do, where is his mind going? He has either got to say, "There is a distinction here which I fail to see", or he has got to say, "My teaching has been all wrong, and if it is respectable for these men to do this kind of thing it must be respectable for me to do it", and the tradition must go to the

winds, and we must upset what has always been the practice, always been the belief. That is what troubles me, and I don't like to see this meeting dissolve without expressing it.

MR. THOMPSON.—Mr. Chairman, that leads me to say one thing more. I agree with what Mr. Rackemann has said. This bill is so drawn that if the Supreme Court, which is the proper tribunal, lays down the rule that a certain advertisement would be an unethical and improper one for a lawyer, the trust companies ought not to object if they are forbidden to do the same thing, and that would be the effect of that bill if passed.

THE PRESIDENT.—There is a motion before the meeting. Is there any further discussion of it? If there is none, the question now comes on the motion to appoint a committee of five to meet with a committee of the Corporate Fiduciary Association. Are you ready for the question?

(The motion was adopted.)

The meeting then adjourned.

F. W. GRINNELL,
Secretary.

The President subsequently appointed the following committee:

PHILIP NICHOLS, *Chairman*

WILLIAM G. THOMPSON	ARTHUR W. BLAKEMORE
ALBERT M. CHANDLER	CHARLES B. RUGG

On February 16th the following report was received from the chairman of this committee.

REPORT.

"The committee has given the matter careful consideration, and held a joint meeting with the Committee on Amendment of the Law of the Boston Bar Association at which the whole subject was discussed at considerable length. Subsequently, a meeting was held by the committee of the Massachusetts Bar Association with the representatives of the Corporate Fiduciaries Association.

In the meantime, two bills had been introduced in the Massachusetts Legislature, identical in form, and both of them verbatim copies of the bill mentioned by Mr. W. G. Thompson in the MASSACHUSETTS LAW QUARTERLY. A hearing was held by the Committee on Legal Affairs of the Mas-

sachusetts Legislature on February 12th on both of these bills at which arguments were advanced for and against the same. I was present at the hearing, and stated that the Massachusetts Bar Association had not yet had an opportunity to define its attitude, and asked for a continuance in order that action might be taken by the association and the committee consented to hold another hearing on February 24th, at which time it is expected the hearings will be closed. Our committee subsequently met and voted to recommend that the Massachusetts Bar Association support the bills which had been filed, with the substitution, in the tenth and eleventh lines, of the words 'an association of lawyers' for 'a member of the bar'.

As the Committee on Legal Affairs is expecting the Massachusetts Bar Association to take some definite attitude on this matter at the hearing on February 24th, and as the special committee was not given authority to take action by itself, if anything is to be done on behalf of the Massachusetts Bar Association it will be necessary for the executive committee of that association to pass upon the matter before February 24th. The bills which were filed, and which are under consideration, are known respectively as Senate No. 208, and House No. 754.

Very truly yours,

PHILIP NICHOLS."

Senate 208 and House 754 were as follows:

"Chapter two hundred and twenty-one of the General Laws is hereby amended by inserting after section forty-six thereof the following new section:—

Section 46A. No corporation authorized to act as executor, administrator, or trustee in this commonwealth shall solicit employment in any of said capacities either by advertisements of such a character or by such other means as would, if employed for a like purpose by *a member of the bar*, be a violation of the standards of professional conduct recognized and enforced by the courts of this commonwealth. The attorney general may upon the relation of any bar association incorporated in this commonwealth bring an information in the nature of a bill in equity to enforce the provisions of this section against any corporation violating the same."

In the bill above quoted, the words in italics are the ones for which the committee recommends the substitution of the words "an association of lawyers."

A meeting of the Executive Committee was called, the result of which appears in the following letter:

CHAIRMAN, COMMITTEE ON LEGAL AFFAIRS,
State House,
Boston, Mass.

DEAR SIR:

A special meeting of the Executive Committee was called to consider Senate 208 and House 754, as to which the opinion of the committee was desired by the Committee on Legal Affairs. Nine members constitute a quorum of the committee. There were present eleven members as follows, Messrs. George L. Mayberry, Thomas W. Proctor, Felix Rackemann, Philip Nichols, Arthur W. Blakemore, Horace E. Allen of Springfield, Michael A. Sullivan of Lawrence, Harold S. R. Buffinton of Fall River, Edward A. MacMaster of Bridgewater, FitzHenry Smith of Boston, Bert E. Holland of Boston, and the secretary.

Letters were received in favor of the bills from Francis Burke of Boston and Robert C. Parker of Westfield, and against them from James M. Rosenthal of Pittsfield and John W. Mason of Northampton. A letter was also received relative to the bills from William R. Sears suggesting the position which, after discussion, was adopted by the committee as follows:

> "*Voted:* that the committee do not favor Senate 208 and House 754 in their present form but would favor the passage of a statute prohibiting any person or corporation from advertising or soliciting their own employment or appointment as executor, administrator, trustee, guardian or conservator by other means than the mere statement that they are authorized to act as such."

The foregoing vote was adopted by a vote of 10-1 and the secretary was directed to submit it to the Committee on Legal Affairs.

In order that the committee may understand fully the history of the matter, I am also handing you herewith a proofsheet of the discussion at the annual meeting, Nov. 20, 1924, which will be printed in the February number of the MASSACHUSETTS LAW QUARTERLY. A copy of this proof was sent to the members of the Executive Committee before the meeting. I also enclose copy of the letter of Mr. W. R. Sears above referred to.

Copies of the vote and of the above letter will be sent to all the members of the Executive Committee for their information and probably will be printed in the QUARTERLY with the other discussion for the information of all the members of the association.

I am sending copies of this letter with enclosures to Mr. Denio and one or two other bank representatives, who were at the hearing, for their information.

Yours very truly,

F. W. GRINNELL,
Secretary.

P. S. As I stated at the hearing, the Executive Committee did not suggest in its vote any method of enforcement. While no formal vote was taken on the matter, it was the sense of the committee that bar associations should not be referred to in such an act.

As I also stated to the committee, my own personal belief is that if a method of enforcement is to be considered it should be on the civil side of the court. We have too many criminal statutes now about all kinds of things.

I am sending a copy of the letter of Mr. Sears, as he has authorized me to send it.

F. W. G.

LETTER OF WILLIAM R. SEARS, A MEMBER OF THE EXECUTIVE COMMITTEE.

FEBRUARY 21, 1925.

SECRETARY, MASSACHUSETTS BAR ASSOCIATION,

DEAR SIR:

I regret that I shall be unable to be present as I planned at the meeting this afternoon, but as I have recently been considering as a member of the committee on new legislation of the Boston Bar Association the subject of Mr. Thompson's bill regarding advertising by trust companies which is to be considered, I have put in writing my reasons for believing that some such legislation is required for the protection of the public and I should appreciate it if this letter might be read at your meeting this afternoon.

There are two statements which are generally made by trust companies in advertisements or other literature soliciting their appointment as executors or trustees. They are in substance these:

(1). That the appointment of a trust company means greater permanency.

(2). That there is less danger of loss to the trust estate.

Both of these statements are, I believe, entirely misleading.

(1). *The greater permanency claim.*

(a). The argument is made that the individual dies but the trust company lives on forever.

Yesterday I compared the list of trust companies given in the Boston City Directory for 1920 with a similar list in the directory for 1924 with this result. Of the 35 trust companies listed in 1920, 15 are no longer in existence legally; 13 I believe are entirely out of business; one—the Commonwealth—is merged with a national bank under a national bank charter, and one—the Federal—has exchanged its Massachusetts charter for a national bank charter. Thus the mortality in four years is nearly forty per cent.

It would be a rash person who would venture to predict from the experience of the past that any trust company or bank now in business in Boston—save five or six that seem well rooted—would still be in business ten years from now.

(b). *Loss of identity by change of stock control.*

The trustee of a valuable trust cannot sell or transfer his trusteeship, yet the owners of the controlling stock interest of a trust company can practically and legally, if not legitimately, do so by a sale of their stock enhanced in value by the acquisition of the trust to a set of men who were absolute strangers to the testator, perhaps to men whom he would under no circumstances have been willing to handle his affairs.

(c). There is no assurance whatever that the men in charge of the trust department of a trust company at the time the testator made his will will remain in their position. Indeed, it is likely that many such changes will occur.

(2). *Greater safety in the handling of the trust.*

Interesting light is thrown on this claim by the experience of several Boston trust companies which collapsed in 1920 and 1921. All these trust companies had savings departments and by the decisions of the Supreme Court the relation of the trust company to the savings depositor is that of trustee and cestui que trust. Therefore we have a number of concrete instances of the success of trust companies in handling trust funds. Of the four trust companies, the affairs of which were taken over by the Commissioner

of Banks, two have paid their savings depositors 100% *without interest;* the remaining two have not yet paid that amount. One of the first two referred to could not have done so unless the court had ordered nearly half a million dollars of securities transferred from the commercial department to the savings department. In every case the savings depositors have had to wait a year or more for their money and none of them will get interest during the interval. It is doubtful if any such example of mismanagement or worse by individual trustees can be found. I think of none.

Losses by dishonesty of an individual trustee are referred to, but such losses are, I believe, of relatively slight amount compared to the losses incurred through incompetence and errors of judgment. I suspect that many times greater depreciation to trust estates has been caused by excessive holdings of bonds while money was depreciating in value and failure of proper diversification of investments than through defalcations.

Mr. Thompson's bill imposes as the measure of what a trust company may do the legitimate conduct of a lawyer or Bar Association. This strikes me as somewhat indefinite. I should suggest in its place a simple statute prohibiting trust companies from advertising or soliciting their own employment as executor or trustee by other means than the mere statement that they are authorized to act as executor or trustee. Of course, this may be accompanied by a statement of their financial condition, board of directors, and so forth.

I understand that some negotiations have been going on between representatives of our association and an association of trust companies for the voluntary elimination of such advertising and solicitation. This fact may have some bearing on what the attitude of the Association should be. I am of the opinion, however, that in some way the activities as above outlined of such institutions seeking trust funds should be effectively limited. As to whether this can be done by agreement, I can express no opinion, as I have no facts upon which to base one.

Respectfully submitted,

WILLIAM R. SEARS.

While this number was in the press the pending bills were referred to the "next annual session" by the legislature.

Note.

On the Relation of the Bar Association to the Problem.

There is a great deal of misunderstanding in regard to this whole subject and the relation to it of the bar and bar associations. Some lawyers and a good many people who are not lawyers, regard a bar association as a sort of "lawyers' trust" or "labor union" and thus describe it before the legislature or elsewhere. Under these circumstances, it seems to be an appropriate time to remind the bar and the public of the purpose for which the Massachusetts Bar Association was formed, as stated in its charter as follows:

> . . . "for the purpose of cultivating the science of jurisprudence, of promoting reform in the law, of facilitating the administration of justice, of furthering uniformity of legislation throughout the Union, of upholding the honor of the profession of law, and encouraging cordial intercourse among the members of the Massachusetts Bar; . . ."

There is nothing in these purposes which includes the idea of any "lawyers' trust" or the idea of an association to protect the business interests of members of the bar. The purposes, and the *only* purposes of the association are the general professional purposes described.

The Massachusetts Bar Association is not concerned with the question whether or not the practice of advertising by banks and trust companies is "unfair competition" with the bar. The only concern of the association is as to the advisability of the proposed legislation in the interest of the public and of the beneficiaries whose interests are intrusted to the care of fiduciaries—in other words, the general policy of the proposed legislation in the interests of justice. The association is also concerned with the question how far the current practice of advertising by banks and trust companies affects, not the business interests of the members of the bar or the extent to which they are selected for fudiciary positions, but the general reputation of the bar in the community and the extent to which the contents of some of the advertisements tends to bring the bar into public disrepute.

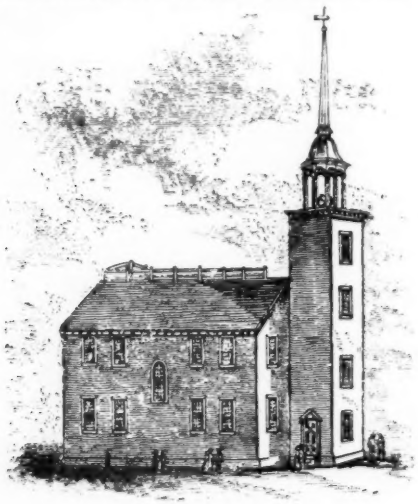
F. W. G.

THE FEDERAL CONSTITUTIONAL CONVENTION IN MASSACHUSETTS IN 1788.

After the annual meeting the members of the association attended the "Bench and Bar" dinner of the Bar Association of the City of Boston. It was a large representative gathering of the bar or over three hundred, including more than thirty judges. George R. Nutter, Esq., President of the Boston Association presided. Brief speeches were made by Chief Justice Rugg, Thomas W. Proctor, the retiring President of the Massachusetts Bar Association, and Hon. William Caleb Loring, Chairman of the Judicial Council. Then followed an exhibition on the screen of scenes and portraits from the legal history of Massachusetts and a photo play, "The Declaration of Independence", as produced by the Yale University Press and distributed by Pathe Exchange, Inc. The meeting was held in the new Chamber of Commerce Building. A special number of the "Bar Bulletin" was placed at each plate containing the following story of the site of the building:

> ". . . When virtuous things proceed
> The place is dignified by the doer's deed."
> —*All's Well that Ends Well.* Act II, Sc. 3.

On the site of this building of the Chamber of Commerce stood the old Meeting-house in "Long Lane" (now Federal Street) where the Massachusetts Convention was held which debated and ratified the Federal Constitution in 1788.



FEDERAL STREET CHURCH, BOSTON.

COMMISSION OF THE MASSACHUSETTS DELEGATES TO THE FEDERAL CONVENTION IN PHILADELPHIA IN 1787.

COMMONWEALTH OF MASSACHUSETTS.

By his Excellency, James Bowdoin, Esq., Governor of the Commonwealth of Massachusetts,

To the Honorable Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong, Esqrs., Greeting:

Whereas, Congress did, on the 21st day of February, A. D. 1787, resolve, "That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a Convention of Delegates, who shall have been appointed by the several States, to be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and the several Legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union." And whereas, the General Court have constituted and appointed you their delegates, to attend and represent this Commonwealth in the said proposed Convention, and have, by a resolution of theirs of the tenth of March last, requested me to commission you for that purpose;

Now, therefore, know ye, that in pursuance of the resolutions aforesaid, I do, by these presents, commission you, the said Francis Dana,* Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong, Esqrs., or any three of you, to meet such delegates as may be appointed by the other, or any of the other States in the Union, to meet in Convention at Philadelphia, at the time, and for the purposes aforesaid.

In testimony whereof, I have caused the public seal of the Commonwealth aforesaid to be hereunto affixed. Given at the Council Chamber, in Boston, the ninth day of April, A. D. 1787, and in the eleventh year of the independence of the United States of America.

JAMES BOWDOIN.

(L. S.)

By his Excellency's command.

JOHN AVERY, Jun., *Secretary.*

Charles Warren, in his recent little book, "The Supreme Court and the Sovereign States," says of the Philadelphia Convention:

"One light touch is given to the Convention when we read, in

* Francis Dana, who was then a Justice of the Supreme Judicial Court, was unable to attend because of his health, and the fact that it would interfere with his judicial duties. He was, however, an active member of the Massachusetts Convention which ratified the Constitution.

a letter of Benjamin Franklin to [Thomas Jordan, May 18, 1787] that it opened with a dinner given by him to the members, at which a cask of porter just received from London 'was broached and its contents met with the most cordial reception and approbation. In short, the company agreed unanimously that it was the best porter they had ever tasted' " (pp. 18 and 136).

After the Convention adjourned, a lady asked Franklin whether we had a republic or a monarchy and Franklin answered, "A republic if you can keep it."

When the Massachusetts Convention met to consider ratification, "a majority were prejudiced against it," (Harding, "The Federal Constitution in Massachusetts," 67; Debates, 410). The Convention met at the Old State House in Boston on Wednesday, January 9, 1788. As the accommodations were not suitable for so large a body, the proprietors of the meeting-house in Brattle Street offered that building for the use of the Convention, and the Convention met there on the afternoon of January 10. As that was not found suitable, a committee was appointed to secure some other place. On Thursday, January 17, it reported as follows:

"The Committee appointed to 'provide a more convenient place for the sitting of the Convention,' have attended to that service, and ask leave to report:

That they have examined the meeting-house in Long Lane, wherein the Rev. Mr. Belknap officiates, and are unanimously of the opinion that the members of the Convention can all be commodiously disposed so as to hear and be heard, by having the pews on the ground floor assigned for that purpose.

That the galleries will well accommodate the spectators.

That gentlemen have offered to put up, at their own expense, a stove, temporary stairs, a temporary porch, and to make other dispositions for the accommodating of the Convention.

And that the Committee of the proprietors of said meeting-house have offered the use of the same during the sitting of the Convention.

That the Committee of the Convention have given directions for the necessary preparations to be made for their reception.

Per order:

TRISTRAM DALTON.

January 16, 1788."

The Convention thereupon voted to adjourn to the meeting-house in Long Lane accordingly and the remaining sessions of the Convention took place there, lasting about a month.

THE CLIMAX OF THE DEBATE.

The opposition of the farmers was summed up by Amos Singletary of Worcester County as follows:

"These lawyers, and men of learning and moneyed men, that talk so finely . . . expect to be the managers of this constitution and get all the power into their own hands, and then they will swallow up all us little folks, like the great leviathan, Mr. President; yes, just as the whale swallowed up Jonah. This is what I am afraid of."

And Jonathan Smith of Lanesborough in Berkshire answered:

"I am a plain man and get my living by the plough. . . . I have lived . . . where I have known the worth of good government by the want of it. . . . When I saw this constitution, I found that it was a cure for these disorders . . . I got a copy . . . and read it over and over. I had been a member of the Convention to form our State Constitution and had learnt something of the checks and balances of power and I found them all here. I did not go to any lawyer, to ask his opinion; we have no lawyer in our town, and we do well enough without. I formed my own opinion. . . . I don't think the worse of the Constitution because lawyers and men of learning and moneyed men, are fond of it. . . . I am not of such a jealous make . . . these lawyers, these moneyed men, these men of learning are all embarked in the same cause with us and we must all swim or sink together. . . . There is a time to sow, and a time to reap. We sowed our seed when we sent men to the Federal Convention; now is . . . the time to reap . . . and if we don't do it now, I am afraid we never shall have another opportunity."

"Long Lane" was changed to "Federal Street" the day after the ratification of the Constitution by the Convention, when a great procession took place.

The following verses from a song, written by some local genius for the occasion, appear in the appendix to the Debates of the Convention, pp. 332-333.

"A YANKEE SONG.

The 'Vention did in Boston meet,
But State House could not hold 'em,
So then they went to Fed'ral Street,
And there the truth was told 'em —
Yankee doodle, keep it up!
Yankee doodle, dandy;
Mind the music and the step,
And with the girls be handy.

They ev'ry morning went to prayer,
And then began disputing,
'Til opposition silenc'd were,
By arguments refuting.
Yankee doodle, etc.

Then 'Squire Hancock, like a man
Who dearly loves the nation,
By a concil'atory plan,
Prevented much vexation.
Yankee doodle, etc.

He made a woundy Fed'ral speech,
With sense and elocution;
And then the 'Vention did beseech
T'adopt the Constitution.
Yankee doodle, etc.

The question being outright put,
(Each voter independent)
The Fed'ralists agreed t'adopt,
And then propose amendment.
Yankee doodle, etc.

The other party seeing then
The people were against 'em,
Agreed like honest, faithful men,
To mix in peace amongst 'em.
Yankee doodle, etc. . . ."

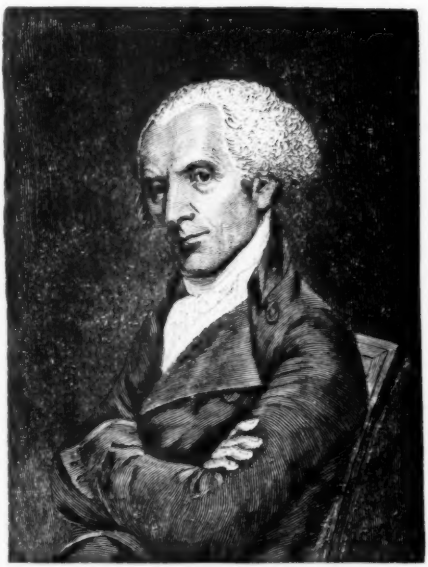
A BRIEF ACCOUNT OF THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION.

Nathaniel Gorham was born in Charlestown, Mass., in 1738 and died in 1796. He was about 49 years old at the time of the Philadelphia Convention and "when that body went in to a committee of the whole" he "was called by Washington to the chair, no doubt on account of his legislative experience and skill as a parliamentarian, and in that capacity served for three-fourths of the time that the Convention was in session." (Carson "The 100th Anniversary of the Constitution of the United States" Vol. I, 147.) He was also an influential member of the Massachusetts Convention.

Elbridge Gerry of Cambridge, Mass., was born in Marblehead in 1744 and died in November, 1814, while holding the office of Vice-President of the United States. He was Governor of Massachusetts from 1810 to 1812. In the Federal Convention when he

Nath Gorham

Caleb Strong



Elbridge Gerry

Rufus King

THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES.

was about 43 years old he took an active part in the debates; but joined with George Mason and Edmund Randolph of Virginia in refusing to sign the Constitution. He was not a member of the Massachusetts Convention but his views were influential in leading to the first ten Amendments suggested by the Massachusetts Convention and submitted by the first Congress.

Rufus King of Newburyport was born in Scarborough, Maine, in 1755 and died at Jamaica, Long Island, in 1827. He was 33 years old at the time of the Convention and took an active part in the debates and also in those of the Massachusetts Convention. He was influential in both bodies. After the ratification of the Constitution he moved to New York and was elected United States Senator from that State. He also served later as minister to London and declined the position of Secretary of State.

Caleb Strong was born in Northampton in 1745 and died in 1819. He stands out as one of the quiet, strong men of "judgment" in the history of Massachusetts. He was about 42 years old at the time of the Convention in Philadelphia. He did not sign the Constitution because he was absent on leave on the day it was signed but he was a strong supporter of it and an influential member of the Massachusetts Convention. He became one of the first Senators of the United States from Massachusetts. In 1800 he was elected Governor and was re-elected annually until 1807 and again from 1812 to 1816, serving ten terms.

A STORY OF MR. JUSTICE KEKEWICH.

(From The Solicitors' Journal & Weekly Reporter).

"A colleague on the Chancery Division, who did not altogether share Mr. Justice Kekewich's love of novelty in legal argument and therefore gravely distrusted his decisions, used to lighten his copy of the Chancery Reports by systematically tearing his learned brother's cases out of the parts as they came in. But one day Mr. Justice Kekewich dined at his colleague's house. In the study before dinner he happened to pick up a copy of the current number of the Reports and looked up some of his own cases. To his surprise they all appeared to have been pasted or sewn in to the volume, whereas none of the other judges' decisions had been so treated. With the acute Sherlock Holmes' instinct which was a discomfiting characteristic of the learned judge, he at once grasped the situation. His brother judge, in a fit of temper, had torn out the cases which offended him; but his lady, remembering that Mr. Justice Kekewich was soon to be their guest, had taken the trouble to laboriously stitch the pages in again."

EARLY FILES OF THE COUNTY COURTS OF MASSACHUSETTS, BY NATHAN MATTHEWS.

(By permission from the Proceedings of the Massachusetts Historical Society for October, 1923.)

The purpose of this informal address is not so much to discuss the courts established and the law administered in the Puritan Commonwealth of Massachusetts, as to call attention to the wealth of material for the early history of our people in their personal and social relations which lies buried in the files of the county courts organized in the first few years after the foundation of the Colony.

So far as the jurisprudence of this period is concerned the records are fairly complete and reasonably accessible, although there is only one known copy of the most important code or "Laws" of 1648. The decisions of legal questions incidentally made by the General Court are to be found in the official edition of the Colony Records. The Court of Assistants functioned from 1629 to 1692 and most of its records have been preserved and partly printed. Unfortunately they are of little use to the student of colonial law, because the court seldom gave its reasons, and almost every case, at least on the civil side of the court, might have been decided on any one of several grounds. The legal history of seventeenth century Massachusetts is still to be written; but the materials, such as they are, can be extracted from the records already referred to and from those contained in the files of the inferior courts which are the subject of this paper. The result of such an inquiry would, however, be disappointing. A land without lawyers cannot have produced much law; and a government which, after sixty years of successful operation fell because of the absence of an educated bar, is not to be looked to for instruction in the science or practice of the law.

The records last named, the so-called "files" of the county courts and the other inferior tribunals which operated under the colony government, have been in large part preserved, in the shape of writs, complaints, answers, depositions, judgments, and appeals, for every settlement which for any length of time was under the jurisdiction of the Massachusetts Bay between 1630 and 1690. The papers in these files are so voluminous in extent and so comprehensive in character as to be a source of information regarding man-

ners, customs, character and habits which, I believe, is entirely without a rival in the history of any other people who played as considerable a part in the history of the seventeenth century as did the founders of Massachusetts. Until lately, these documents have been practically inaccessible. The object of this paper is to call attention to the importance and relatively small cost of preserving them in print.

The great and unexpected immigration to New England which followed the successful establishment of the Governor and Company of the Massachusetts Bay in what was afterwards known as Boston harbor, brought about almost immediately the transformation of a commercial company into a political colony, and this involved, notwithstanding the hostility of the governing class to law and lawyers, the establishment of tribunals of some sort before which the individual disputes of the colonists could be litigated. During the first five years, 1630 to 1635, we find the Court of Assistants regularly, and the General Court sometimes, functioning as judicial tribunals; but there were, apparently, no regular local courts until 1636. By that time there were about fifteen settlements or "towns" within the limits of the Massachusetts charter as ultimately determined, besides a few others further east within the limits of the Mason and Gorges patents, jurisdiction over which had been, or was soon to be, assumed by the Massachusetts Colony. There were probably between ten and twenty thousand persons then living under the Colony Charter, and regular courts had become a practical necessity.

Accordingly at a general court held at Newtowne (now Cambridge) on March 3, 1635-6, four popular courts were established for the administration of justice in both civil and criminal affairs; one at Cambridge, one at Salem, one at Ipswich (to include after 1641 also the existing settlements in what is now New Hampshire) and one at Boston. The Boston court had exclusive jurisdiction over that town, Roxbury, Dorchester, Weymouth and Hingham, and after 1641 concurrent jurisdiction with the courts at Salem and Ipswich in cases involving £100 or more. After the establishment in 1643 of the four counties of Suffolk, Middlesex, Essex and Norfolk (that is "old Norfolk," meaning the settlements in what is now New Hampshire or Maine), the jurisdiction of the Suffolk County Court held at Boston was extended to include Dedham, Braintree and Nantasket in addition to the five towns already named.

The court files for Essex County are being printed, and eight volumes, covering the period between 1636 and 1683, have already appeared. The equally important records for Suffolk and Middlesex counties should also be made accessible to the public; for it is not too much to say that the real history of the founders of Massachusetts is to be found in these voluminous, intimate and (except for Essex County) practically inaccessible records. They are of the greatest value and importance in giving a full and truthful picture of the manners and customs, as well as of the social and economic conditions existing in the Colony of the Massachusetts Bay from the earliest days of the settlement. There is no other original source to which the historian or sociologist can go that compares in extent and diversified character with this accumulation of documentary evidence; for in the early days nearly every person, sooner or later, came into contact with the courts, either as plaintiff, witness or defendant.

As illustrating the comprehensive character of these files it may be seen, by glancing through the index to a single volume, that those for Essex County contain exhaustive information concerning lands, farms, orchards, rights of way and land titles generally; highways, drains and other public works; descents, wills, inventories and other incidents of the administration of estates; the construction, cost and other details of houses, churches, barns, mills, shops, malthouses, breweries, inns and other buildings; furniture, furnishings and over two hundred kinds of household utensils; horses, cows and other domestic animals; about seventy-five kinds of cloth and one hundred different articles or materials of clothing; about fifty articles of food and a dozen kinds of drink; vessels of many kinds and equipment; military affairs, armor and weapons; relations with the Indians; amusements; licenses for innholders and the sale of liquor; manufactures, trades, professions; medicines and diseases; trespasses of all sorts upon real estate; personal injury cases; actions of slander and libel; crimes and misdemeanors of all sorts—over one hundred kinds; the churches, their members, pastors and affairs; and innumerable other individual, social and political matters.

Many histories have been written of the Puritan Commonwealth of Massachusetts, some of them invaluable as convenient and accurate records of events and facts; but the sources of information usually drawn on have been the public records, supplemented, for the first two decades, by Winthrop's *Journal,* and the historians

have often been special pleaders for a particular cause or party. What may be called the standard histories of Massachusetts, chief among them that of Palfrey, contain accurate and reasonably full accounts of the political events and struggles of the time; but the writers of these books are generally too much in sympathy with the Puritan views of church and state to do justice to the effect of these views upon the common affairs of the people. The critics of Puritan Massachusetts, like Oliver and Brooks Adams, also pay undue attention to the politico-theological controversies which fill so many pages in Winthrop's *Journal* and the lamentations of Johnson and Mather. These writers, like their pro-puritan opponents, make little or no use of the town and court records in which the actual life of the people is disclosed. More recently Mr. J. T. Adams, also making no use of these, the really "vital records" of the time, assumes—entirely without proof—that the majority of the early settlers were opposed to the rule of the clergy, that the people had no military desires or aptitude, and that the government of the colony was in general unrepresentative and ineffective. Other critics of our ancestors interpret the prosecutions for being "disguised" or "distempered" with drink as indicating that there was an excessive amount of drinking in seventeenth century Massachusetts, which by inheritance has had a degenerating effect upon the descendants of the Puritans. None of these errors could have been made by writers who had carefully investigated the local affairs and private lives of the 30,000 English men and women, more or less, who came to Massachusetts between 1630 and the outbreak of the Civil War in 1641 and their descendants, as set out in the town records and the files of the county records from 1635 to 1692.

As to the Suffolk files, the late John Noble, clerk of the Supreme Judicial Court, wrote in 1897 as follows: "The early days are reproduced with a vividness which no formal history can give, and the picture of the times has a local color and atmosphere otherwise unattainable. . . . The preservation of these papers cannot fail to prove of inestimable value and bring a lasting credit to the County of Suffolk . . . and to the successive administrations, Mayors, and Aldermen, who have shown their constant interest throughout." These papers, which for years had been the prey of genealogists and autograph hunters, were in danger of complete dispersion when in 1883 through the efforts of Mr. Hugh O'Brien, then a member of the Board of Aldermen and afterwards Mayor

of the city, the Board adopted an order authorizing the arrangement, repair and preservation of the original court papers of the county of Suffolk covering the period from 1629 to 1800. The papers from 1629 to 1692 were pasted into thirty-one folio volumes. Those for the period between 1692 and 1700 fill twenty-one volumes. It is of the utmost importance that this invaluable collection of documents and facts should be printed in a form somewhat similar to the printed records of the courts of Essex County, so that the details of the social and economic history of the people of Boston in the 17th century, as they really lived, may at last become known.

As to the number of volumes, the time required and the probable cost of the work, the best estimate I can make is that the Suffolk Court papers from the beginning down to the Province Charter, 1692, could be printed in from eight to ten volumes at a net cost of about $3000 per volume, and that the work could be completed within five years.

There are in existence two manuscript volumes of the proceedings, or records in the strict sense, of the Suffolk County Court; one covering the period between 1671 and 1680, the other the period between 1680 and 1692; but as the final records of the court will be included in the volumes the printing of which is now urged, no further expense need be incurred for the printing of the manuscripts referred to.

There is another volume of ancient records which ought to be printed now. The proceedings of the Court of Assistants from 1673 to 1692 were published in 1901 as volume I of the records of that court, and in 1904 the records from 1630 to 1644 were printed as volume II. This left the period from 1644 to 1673 for a third volume which is already in manuscript form and partly in print. While these records are mainly confined to the docket of the court in criminal complaints, and are in no sense comparable in utility for legal or historical purposes to the papers in the files of this court or of the inferior county courts, it would nevertheless seem that the gap in these records as printed should be filled by the publication of volume III of the Records of the Court of Assistants. The estimated cost of publishing this volume is about $2,500.

The expense of arranging, editing and printing the Essex County records has been defrayed partly by the county, partly by private subscriptions and partly by the sale of the printed volumes for which there is a fair demand from lawyers and public libraries. It would seem that the city of Boston, which finances the county of

Suffolk, might easily have appropriated the small sums necessary to print the final volume of the records of the Court of Assistants, and to commence the compilation and publication of the files of the County Court; but for twenty years it has been impossible to interest the city government in either of these matters. Recently, in 1921, and again in the present year, efforts have been made to secure a modest appropriation for this purpose, but without success.*

There is other work to be done in making the original sources of our colonial history available and easy to use. A new index to the five large volumes of the *Colony Records* is needed; also one for Winthrop's *Journal*. Permission should be granted by the owner of the only copy in existence of the 'Laws of 1648'' to have them edited and reprinted. The printing of the early town records should be completed, notably for Ipswich, which practically throughout the seventeenth century was the second town in Massachusetts. A general index of the early letters, narratives and miscellaneous papers which have found their way into print should be prepared. But the most important work of all for the lawyer, student and historian is the publication of the court files of Suffolk and Middlesex counties, which, owing to the vast numbers of depositions preserved in them, probably contain more information about life and manners in the seventeenth century than the records of any other people.

The cost of editing and printing the Suffolk and Middlesex files would not be over $50,000, and although I dislike to close this address with what may sound like an appeal for money, I know of no better place than a meeting of the Massachusetts Historical Society at which to set forth the need for raising the money to make these necessary records available to the public.

And there is no time like the present. The Puritan race is passing on, and its influence in the nation it helped to form is being over-balanced by other races and by other ideals of politics and conduct. The founders of Massachusetts are removed from us by from six to ten generations; their aims are hard to understand; and according to our ideas they must have been an uncomfortable people to live with. They had no taste for literature, science or art; no regard for the beauties of nature; and but little love of pleasure or sport. They had settled in a land of rocks and sand,

* Since this address was delivered the Mayor and City Council have appropriated $12,000 for the compilation and publication of the early court records.

"intolerant of culture." They were consequently poor, and they lived what to us would be forlorn and cheerless lives. But during the sixty years of the Colony Charter there were no public frauds, no peculation, no selfish ambitions, no cheap politics. All these came in with the Province Charter and its royal governors. It is not too much to say that during these sixty years there was no governor, deputy governor, or member of the Court of Assistants, or any person of commanding influence in the government of the Massachusetts Bay, who could not as he left this world raise his right hand up to heaven after the manner of the Puritan oath and truthfully say, as one of them did, that it had been his sole ambition "to be of service in a common way," or in the language of another, speaking of the state he had helped to found, "I have made it my wife, my life." No such record of unselfish, incorruptible and unremunerated public service as that established by the Puritan leaders of the Massachusetts Colony can, I believe, be found in the annals of any other people. They founded New England, and their descendants, more than any other division of the English race, have shaped the history of the United States as we have known it. They were our people, and we are the natural guardians of their history and repute. Is it too much to expect that our interests and generosity will enable the true history of Puritan Massachusetts to be written from the important but now inaccessible papers which I have brought to your attention this afternoon?

Note.

Mr. Matthews proves his case for the publication of these records. We may criticize and abuse the Puritans and their descendants. But whatever their faults and limitations, the individual *character* of the Puritans is one of the great outstanding facts of history which no criticism or abuse can alter. It was their force of character which alone enabled them to overcome the hardships and settle and develop New England and it was a similar force which enabled their "Yankee" descendants or successors "a new people of mixed stock" to think out and practice the representative form of republican government which so profoundly influenced the form and character of the nation. Anything that can help the American people to a better understanding of the lives of these vigorous people instead of mere traditional respect, is worth doing because it will help in developing the imagination to appreciate the force

of example and the need of standards. Bigoted they may have been —their creeds were stern;—but they made Massachusetts and ultimately set standards for America. The conditions of life in early Massachusetts may have been narrow, but they were too stern for *shams* on a large scale and that is why the study of them is valuable to us in these days of "social," "collective," "altruistic" and every other kind of sham in which we wallow and in which the foundation of civilization—*individual character*—is often obscured.

Those of the descendants and successors of the "Puritans," known as Massachusetts "Federalists" in their day, were also, and are still, criticized and abused but, as Samuel E. Morison has said in his "Life of Harrison Gray Otis" (Vol. II, p. 309):

> "Massachusetts has little reason to complain of her long experience of Federalist rule; while other states, in which Democracy early came to its own, were swimming in political corruption and extravagance, the Federalist administrations in Massachusetts set a standard in honesty, efficiency, and wise advance, that no government of and by the people has surpassed."

As Mellen Chamberlain said of John Adams,—it matters little to "the stout old patriot" what we think about him "for he will never wholly die," but to us and to those who come after us it is "of more than passing moment" that he should be understood *at his best*. So it is with the men of early Massachusetts. It makes no difference to them whether we try to understand them or not, but it may make a great deal of difference to the future of Massachusetts and the nation at large if we are willing to learn and to make it possible for others to learn more about our own history and its lessons.

Mr. Matthews knows Massachusetts history and its sources better than most of us. The public authorities will perform a patriotic service of national importance if they follow his advice and make these early sources of history available, and save the necessary funds by lopping off some less important expense. His proposal is for an investment for the ages. The cost will be negligible in comparison with the ultimate value. If the present wave of public "economy" stands in the way, there is an excellent opportunity for public spirited citizens to assist with contributions which may be more helpful to the country than many worthy charitable enterprises. There is, perhaps, no more useful and patriotic charitable

purpose than that of making our own history more accessible in these days when it is so much easier to forget than to learn.

In a letter to Jefferson in 1815, John Adams wrote:

> ". . . arbitrary power, wherever it has resided, has never failed to destroy all the records, memorials, and histories of former times, which it did not like, and to corrupt and interpolate such as it was cunning enough to preserve or tolerate. We cannot therefore say with much confidence what knowledge or what *virtues* may have prevailed in some former ages in some quarters of the world." (MASSACHUSETTS LAW QUARTERLY, May, 1917, p. 405).
>
> We have an interesting illustration of this in the fact that a year or two after Chief Justice Oliver had sailed away with Lord Howe, the American patriots felt that "patriotism" demanded that they should burn, not only his fine old house on Muttock Hill overlooking the Nemasket River, in Middleborough, but also his large library, which was one of the best in the colonies. (See Thomas Weston's paper on "Peter Oliver").

If we allow important available sources of history to disappear or decay or remain practically unusable by neglect, the result, while less dramatic than the destruction of Chief Justice Oliver's library, will be equally and probably more effective in perpetuating ignorance of our history.

F. W. GRINNELL.

AN UNUSUAL ENGLISH JUDICIAL APPOINTMENT—SIR HUGH FRASER, K. C.

(From The Solicitors' Journal, Dec. 20, 1924).

"It is a striking coincidence, although a sad one, that only a few days before Dr. Odgers breathed his last, one of his colleagues as a Reader of the Council of Legal Education, and a former assistant and devil of his own, should have received the signal honour of being the first Reader of the Inns of Court selected for appointment to the High Court Bench. Sir Hugh Fraser, who is now on the verge of sixty-five, has had a long and distinguished career at the Bar. A great authority on the law of libel and on Election Law, he never took silk, but preferred the works and ways of the Junior Bar. As a negotiator in trade disputes and a member of public commissions of enquiry, he displayed late in life his admirable judicial qualities, and no doubt it was this which induced Lord Haldane—whose selection Lord Cave is understood to have adopted as his own—to try the innovation of appointing to the Bench a member of the Junior Bar other than the time-honoured exceptions of the Chancery and Common Law devils of Mr. Attorney. The famous Sir William Blackstone, of course, was an eminent teacher of law raised to the Bench on that account; but that precedent goes back more than a century and a half. Lord Blackburn, too, was an eminent law reported whose genius for law was unexpectedly rewarded in the Early Victorian age with a judicial appointment which in due course made him one of the famous exponents of our Common Law. And in our own day a county court judge famous as a law tutor in his Oxford days, Mr. Justice Acton, was promoted to the High Court Bench by Lord Birkenhead. Such striking innovations, perhaps, are more characteristic of Lord Birkenhead and Lord Haldane than of Lord Cave; but that most conservative-minded of Chancellors is also a very open-minded man, and a generous appraiser of legal talent. His appointment of Sir Hugh Fraser will meet with universal approval."

A REPORT BY THE ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS

Printed by permission of the Committee with the consent of Chief Justice Rugg.

[By Chapter 532 of the Acts of 1922 it was provided that

> "There shall be an administrative committee of district courts, which shall consist of the three presiding justices for the time being assigned by the chief justice of the supreme judicial court to act in the appellate divisions. . . . The committee shall be authorized to visit any district court, other than the municipal court of the City of Boston, as a committee or by sub-committee, to recommend uniform practices, forms of blanks and records, and to superintend the preparing of records by clerks. . . . To promote co-ordination in the work of the courts, the administrative committee may call a conference of any or all of the justices of the district courts. . . ."]

February 9, 1925.

HON. ARTHUR P. RUGG,
CHIEF JUSTICE OF SUPREME JUDICIAL COURT,
WORCESTER, MASS.

DEAR JUDGE RUGG:—

We have the honor to supplement the previous record of our Committee work with the following report.

Our major effort the first year of our official life was first to become acquainted with each of the District Court Judges and to establish a relationship of friendly co-operation with them, and second to acquire a personal knowledge of the District Court rooms, their officials, methods of operation and procedure and the local conditions or atmosphere in each jurisdiction. We do not need to remind you that it is a far journey in conditions as well as miles from the college town in the northwestern corner of the Commonwealth to a busy suburban district in Suffolk County. We are confident no committee of officials ever received a more cordial reception than we. Of ourselves we could not have broken down the isolation of years—only the desire of each judge to learn and follow the best in method and procedure could have accomplished what seemed at first impossible. Today we are happy to report that there are no longer seventy-two District Courts in Massachusetts but "The District Court of Massachusetts".

We developed for our major program during the second year a series of conferences. The first of these were the regional conferences with the judges. For this purpose we brought them together in Pittsfield, Springfield, Worcester and Boston. From the very first it was clearly demonstrated that here was a new and unusually helpful idea. In round-table talk there developed many ideas and methods in use or contemplation—some of the former were found erroneous or improper—some of the latter generally adopted. Doubtful points of law were cleared up and in pursuance of our matured judgment general policies were recommended in certain types of cases. Judges became acquainted with each other and invariably these conferences were reported by all to have been both helpful and stimulating.

As these conferences increased in number, new and better ideas and methods developed and were passed along to the end that the common and matured judgment of the majority might be found. These conferences were interspersed with others held with representatives of the Superior Court, with the Attorney General, the District Attorneys, Prison Commissioner and Probation Commission. All of these proved helpful and we think were useful in welding together the agencies of law enforcement which before had been far from satisfactorily articulated.

The fall of 1924 saw us beginning our third year with our committee unchanged in personnel. So satisfactory had been the result of our regional conferences that we decided to continue them. We changed our plan somewhat by making them smaller in number so far as the judges were concerned but inviting each to bring one or more of the Special Justices attached to his Court. These Special Justices now sit quite regularly in many of the Courts and it is obvious should share the value of the conferences and ideas there developed. This plan proved immediately to be wise. We sat in Pittsfield, Springfield, Northampton, Worcester, Fitchburg, Salem and Boston, and have just finished the last of these gatherings. These conferences have again been uncommonly helpful and stimulating. There have been renewed evidences of a growing consciousness of unity, of intelligent study of duties and responsibilities, and wise and efficient development of policies and procedure. We have been impressed anew with the friendliness and spirit of co-operation on the part of the judges.

We have also continued our conferences with other agencies of law enforcement.

The right of appeal, the practice of appeal, the reasons therefor, the results in the Superior Court and the very practical situation which the use and abuse of the right of appeal raises have all received careful study. We have had the benefit of the advice and knowledge gained by the District Court judges who have been sitting in the Superior Court, an experience we believe to be of great value to them, to us, to the Superior Court and the public.

A matter of importance and difficulty has been the problem of the wise enforcement of the Motor Vehicle Laws and our relationship to the Registry of Motor Vehicles. We are glad to report a better co-operation, a more intelligent understanding on both sides brought about by frank and friendly discussions with the Registrar. Uncontrolled administrative authority and judges are not likely to be of the same mind. The former seldom has judicial training or quality of mind and is impatient of the seemingly slow and cautious processes of the Courts. The latter are often slow to respond to new conditions and necessities. Both factors are necessary and important in our system of government. The problem is to find a way to attain co-operation on the part of agencies so opposed in form and thought and action. We are confident that progress is being made. We have not hesitated to advise change of procedure when it was clear the Courts were lacking or careless, nor have we spared frank speech when other agencies seemed to need reminder that there is no place for superman in our type of government and that when we accept dictation and abandon the right of discretion and the principles of law we cease to be Courts. There has been some justifiable impatience and resentment on both sides but we have sought to show the magnitude and difficulties of the problems which the development of the Motor Vehicle Laws has brought to the Courts and asked for patience and helpfulness in solving them. We desire at this time to re-emphasize our unqualified confidence in the District Courts. The judges of these Courts are men of character and integrity, filling positions of trust and of great difficulty and responsibility. It would not be surprising if, in the thousands of cases disposed of by them each year, a few decisions should prove to have been unwise, especially when as it should always be borne in mind the judges are not prosecuting officers but there must be dependence upon legal evidence and not hearsay and their judgments must be based upon knowledge gained from or by other officials of the Court. We affirm there is no basis for lack of confidence in the Courts of this Commonwealth as a whole.

During the past year there have been occasions, fortunately few in number, when we have felt obliged to use our influence to bring about changes in the personnel in some of the Courts, and we have not hesitated to advise in frank terms where thoughtlessness or misunderstanding have produced dissatisfaction or lack of confidence in any Court. Such frank but friendly advice has, we are sure, brought about needed changes in methods and ideas. While we do not believe a judge should be an official censor or mentor in his jurisdiction, his personal and official life and conduct should be above reproach. Further, when any man accepts an office as a judge he should be prepared to give all the time and attention necessary and not treat the official position as of secondary importance.

Several of the larger Courts are confronted with a serious problem. The work has so increased in these Courts that the judge can no longer personally dispose of all the business and has to call upon the Special Justices for almost continuous assistance. This service is so interfering with the private practice of the Special Justices that a number have already resigned and others have indicated that they cannot continue to serve without serious financial loss to themselves. In our opinion the solution of this problem lies in the appointment of one or more Associate Justices for these larger Courts and such appointment to be on a salary basis which will permit full-time service. The cost to the public will be little, if any, greater than now and the result in service will amply justify any increased expenditure.

The development of the Appellate Division has been slow but gradual. The Northern District leads in the number of cases considered. In this district there has been some inconvenience due to the drafting of the judges of the division for service in the Superior Court. Removals are about seven per cent. of the writs entered. This percentage seems excessive and a study convinces us that delay is the factor of importance in the majority of such removals. We advocated and still approve of legislation requiring a bond as a condition of such removals. There is need for more intelligent study of the procedure by the bar and bench alike, more care in the presentation and argument before the Trial Judge and Appellate Division and more expedition in the preparation of reports and briefs. We are compiling statistics for the past year on the same general lines as those prepared by us last year and now printed and available.

We again express our personal appreciation of your friendly

interest and helpful advice. They have made possible what we believe will prove to be one of the greatest advances in judicial procedure in this Commonwealth in many years.

Very respectfully,

FRANK A. MILLIKEN,
JAMES W. MCDONALD,
CHARLES L. HIBBARD.

Note.

The reasonable requirement of a removal bond which has existed in the Boston Municipal Court since 1912, has been extended to the District Courts generally, while this number is going to press, by Chapter 132 of the Acts of 1925 approved on March 18th, to take effect October 1st, 1925. The removable bond to cover costs in the more expensive court is nothing more than the old "appeal" bond to cover costs which was always required of a party under the old appeal system. Twelve years' experience in the Boston court has shown that although the act gives the court authority to allow removal without a bond for cause shown, the applications for relief from the bond have been so few as to show that there is no more hardship in the requirement than there was in the old appeal bond requirement. It is simply a reasonable check on the use of the public's most expensive court for delay at the expense both of the litigants and the public. The bond was recommended by the Judicature Commission. (See Report, MASSACHUSETTS LAW QUARTERLY, January 1921, p. 40.) F. W. G.

REPORT OF SUFFOLK COUNTY BAR COMMITTEE ON CHARACTER OF APPLICANTS FOR ADMISSION TO THE BAR

By rule VII of the Board of Bar Examiners approved by the Supreme Judicial Court January 17, 1923, it is provided:

MORAL CHARACTER

"A preliminary inquiry whether an applicant is of good moral character may be made by a committee of the Bar requested by the Board of Bar Examiners to furnish such assistance.

"It is the duty of each applicant to supply such committee with any assistance and information which it may require and to appear before it when requested."

This committee is a committee of the Bar itself and not of the Association but its members and their addresses are printed for the information of the Bar.

RICHARD W. HALE, *Chairman*, 60 State St., Congress 510

CHARLES S. HILL,
24 Milk St., Congress 3360

A. K. COHEN,
611 Tremont Bldg., Hay. 4300

HENRY V. CUNNINGHAM,
635 Tremont Bldg., Hay. 4044

ELIZABETH M. TAYLOR,
30 State St.

The names of the members and the rule under which they function are printed above. On request, the Committee furnishes this report on its scope and doings.

It has now sat upon the Suffolk County applicants who have been successful in three examinations. In number they were as follows:

From the July examinations of 1923.....	93
From the January examinations of 1924.....	77
From the July examinations of 1924.....	123

Every applicant has had a personal interview face to face with the Committee. The result appears to us to be positive proof that Henry F. Hurlburt, John Lowell, Jeremiah Smith, and the writer were justified in saying that this work must be done in the future to preserve the quality of our Bar.

Of course, a large number of the applicants are positively of good moral character and that is easily ascertained. It does no harm and may perhaps do some good to teach these men that good character must both exist and be proved to us.

A still larger number of the applicants come before us with a good deal of inexperience. They are possessed of obvious but mainly negative virtue. Their character and stamina seem to us sufficient to justifiy their admission. The larger part of them show ignorance as to the existence of moral duties among members of the Bar, often even of the code of ethics, and sometimes of such a thing as an attorney's oath. They may know the words as seen upon a printed page, but they have never thought of any practical application of any moral duty peculiar to the lawyer. For instance, scarcely one of this class, unless warned by the experience of those who have preceded him in the hearing room, can tell us what it is to "consent to the doing of falsehood in court," and many are as ignorant of the very existence of a rule against that, as they are of all practical application. We think the Committee has functioned well in awakening these applicants to the existence of such things as morals and ethics. We believe they intend to do right, and will speedily gain experience enough to accomplish that end.

Our most difficult class is happily a very small one. In each set of applicants, two or three have appeared before us who are wholly atrophied as to fitness for the performance of moral duty. On the one hand such a man might be obviously free from any specific moral fault. On the other hand, the Committee would vote unanimously that he was a man who would be sure to fail the client whomsoever he might be, in advising on any question of morals whatsoever that might be. We are in grave doubt whether such a man has good moral character within the meaning of the statute. We are clear he is not fitted to join the Massachusetts Bar.

In each set of applicants, we find men with criminal and other like records deserving inquiry. Some of this class are not only criminal, but also unskillful, and show existing bad character by attempts to deceive the Committee.

We have reported against a few men and for a variety of reasons. All of these have appealed to the Bar Examiners, as is indeed their right. There is apparently a further appeal to a single justice of the Supreme Judicial Court. We doubt whether this is a good arrangement. Each applicant has three complete trials de novo, with each favorable result in practice final, and each negative result, except the last, appealable. We have not yet sufficient experience to speak finally on this point. Meanwhile, the Executive Committee of the Bar Association retains counsel to oppose the admission of any applicant against whom we report unfavorably. The service is closely parallel to that rendered by the Grievance Committee.

On the whole, the experience of our Committee is reassuring. We find the Bar is being supplied from all sections of the community, from all classes, races and creeds. No citizen, and indeed no resident of the State, need feel he is without representation in the Bar, or that his children, or he himself, will be debarred from rising to serve the community in our profession.

A large and disconcerting proportion of those coming to the Bar in Suffolk County need better legal education. This lack hampers their ability to serve and advise in the way of morals, and to realize and perform their duties to their clients and the community. We find the general and prevailing attitude, however, is one of honest desire to learn what that duty is, and to do it well.

Respectfully submitted,

(Signed) RICHARD W. HALE, *Chairman.*

ARBITRATION.

(From the "Bar Bulletin" for Jan., 1925.)

In earlier numbers, reference has been made to the movement in various parts of the country for a law to make enforceable, agreements in contracts for the arbitration of *future* commercial disputes under such contracts which arise after the agreement to arbitrate. This matter was brought before the Massachusetts Legislature by business men last year. Nothing was done, partly in view of the fact that the subject was under consideration by the National Conference of Commissioners on Uniform State Laws. That conference last summer reported a draft of a proposed uniform act for arbitration agreements to be made after disputes have arisen. Massachusetts has had such an act for a century or more, which now appears as G. L. c. 251. A brief account of the Massachusetts law on the subject, with references, will be found in the MASSACHUSETTS LAW QUARTERLY for January, 1924, p. 52. Meanwhile, the Committee on Commerce, Trade, and Commercial Law of the American Bar Association presented a report last summer, showing the proposed "United States Arbitration Act," which was favorably reported by the Judiciary Committee of the House in January, 1924, and was also pending in the Senate. (See programme of annual meeting of American Bar Association for 1924, pp. 32-57.) That act seems to follow the lines of the New Jersey and New York acts. [It was enacted by Congress in February.]

The special points emphasized before the Massachusetts Legislature by some who took an interest in the matter, were contained in the following suggested provisions:

> "SECT. 16. If a party to the contract be named as arbitrator, or the agent or agents or employee or employees of any one party to the contract be named in the contract, or selected by the method therein defined, as sole arbitrator or as a majority of the arbitrators under such agreement, the provisions of this act shall not apply."

The purpose was to secure impartial arbitrators as a condition to making such agreements enforceable. The other suggestions were:

> "SECT. 19A. Upon application by a party at any time before the award becomes final . . . the Superior Court

may in its discretion instruct the arbitrator or arbitrators upon a question of law.

SECT. 20. Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the Court to which the report is to be made."

The obvious purpose was to retain some control by the court over the law applied by arbitrators under such agreements, without making it possible for one party to delay an arbitration unreasonably.

Neither of these suggestions were provided for in the New Jersey or New York acts. They do not seem to be provided for in the act pending before Congress. Is it not important that they should be, instead of leaving the law entirely to the arbitrators? People may sign such agreements without fully appreciating their effect. Is it wise to place them entirely beyond reach of the courts as far as questions of substantive law are concerned?

LEGAL HISTORY REPEATS ITSELF.

The following Stories of England and New York deserve attention.

In Sir Frederick Pollock's little book called, "The Genius of the Common Law," pages 61-62, appears the following story.

> "In the latter years of the nineteenth century, notwithstanding the reconstruction of our judicial system in 1875 and the merger of all special jurisdictions in the universal powers of the High Court, there was much complaint among London business men of delay in hearing commercial causes in the Queen's Bench Division. An elaborate scheme for a voluntary tribunal of arbitration was framed by a combination of legal and mercantile wits, and the names of many distinguished lawyers were placed on the rota of arbitrators. It was a mighty pretty scheme, but its promise was cut short in an unexpected manner. Lord Gorell (then Justice Gorell Barnes of the Probate and Admiralty Division) gave out one day that he was ready to put causes of a commercial kind in a special list, expedite all interlocutory stages, and abridge or wholly dispense with pleadings, if the parties would only undertake not to raise merely technical points and to admit all substantially uncontested facts. He also gave a hint that (the actual jurisdiction being undoubted under the Judicature Act) it would not be the Court that would ask whether any particular cause were exactly an

Admiralty matter. This pioneer experiment was speedily followed by the common-law judges, who established the so-called Commercial Court by a simple exercise of administrative discretion. It is in truth not a distinct court, but a special cause list open to parties on the understanding devised in the first instance by Justice Gorell Barnes, and assigned to a judge familiar with commercial matters. The arrangement works excellently, and nothing more is heard of the grand arbitration scheme which was to relieve the congested courts and display the superior resources of private enterprise. Of all this the general public knows nothing and some lawyers very little; for it was done with no controversy and in absolute minimum of formality. Sure I am that for so complete and peaceful a triumph of rational procedure Lord Gorell Barnes and his companions have earned our lady's most benignant smile."

EXTRACT FROM THE NEW YORK TIMES, FEBRUARY 11, 1925.

To the Editor of The New York Times:

"Arbitration and its advantages have been heralded from the housetops. The expense, the delay and the formality of a law-suit have been emphasized as reasons for arbitration. Legislation has been enacted strengthening arbitration provisions in contracts. Arbitration has been made to appear a lost river of justice, discovered in the year 1924.

"Practical experience has tested its inadequacy to meet the general demands for justice. Where the dispute is in good faith, a voluntary agreement for arbitration is usually effective. But parties often, for many reasons, refuse to arbitrate. They may prefer a trained Judge or a jury, or they may like the thought of a probable delay to work to their benefit. Obligatory arbitration clauses are now being generally inserted in contracts, and they are being signed by interested parties who little realize their serious import. Upon a breach, the injured party, sure of his case, might prefer a trial by a Judge experienced in deciding similar disputes. rather than being forced by his contract to go before arbitration, where, true, a prompt decision is rendered, but which may amount to a compromise verdict.

"The courts have encouraged arbitration. The Supreme Court for this county has created a trial part where cases can be tried by a Judge without a jury, with all the advantages of arbitration minus its disadvantages. If both sides are willing to waive a jury, the case can there be tried within three days after issue and all formalities waived. Thus if action is commenced on the 1st, the defendant can answer on the 2d, and on the 3d the case can be out on the calendar ready for trial. It will be tried that day or at the longest within two or three days. If some of the witnesses are

absent the case will proceed and the absent witnesses heard on their return. Litigants can waive the presence of their lawyers if they so desire.

"This is an innovation to which too much attention cannot be directed. It is an experimental step in the right direction, which must depend for its development upon the support of the community and the bar. Here you have it—a real Judge, possessing all the qualifications necessary for the ideal arbitrator, plus a training and experience which few possess, with facilities of every kind paid for by the State, ready to hear your case promptly, try it speedily and give an immediate judgment based upon justice, experience and knowledge.

"Let the radicals give the same publicity to this radical innovation in a court of justice that they would give to a proposal which may sound ideal but cannot be as effectively and practically executed under our form of law.

I. MONTEFIORE LEVY.

Member Committee on Law's Delay,
New York, Feb. 6, 1925."

THE "DRIFT" TOWARD ARBITRATION IN ENGLAND AND SCOTLAND.

(From "The Solicitors' Journal", Jan. 10, 1925, page 251.)

"Among the chief forms of specialisation which are now in vogue amongst solicitors, undoubtedly the most important is that which is known as 'City practice.' In London, in Manchester, in Liverpool and in all the large seaports there are found numerous firms which do not invite other work than that which is comprised within the somewhat vague term just quoted. Commercial work, Admiralty litigation, company drafting, bankruptcy administration, and perhaps an occasional patent case make up the lines to which they devote almost exclusive attention. . . . Beyond any doubt there is a markedly growing drift of mercantile laymen away from the Commercial Court to private arbitration. Not only is an arbitration clause becoming almost common form in large commercial contracts, but even where submission to arbitration has not been expressly agreed to beforehand the parties, after a dispute arises, seem very ready to avail themselves of it. Various semi-official panels of arbitrators exist, provided by important societies. In banking, insurance, shipping, estate agency, building, civil engineering works such unofficial courts of experienced arbitrators prove exceedingly useful. Of course, in many cases, the arbitrators are members of the Bar and select some distinguished counsel as umpire. Generally they would appear as advocates in all the leading arbitrations. Nevertheless, the tendency of arbitration is undoubtedly to gradually limit the field of litigious employment—both for barristers and for solicitors. Why the layman resorts to arbitration is not always clear. Expense is probably an important consideration.

The exceptionally heavy fees required by leading counsel in the Commercial Court are a great burden on the commercial world, especially in view of the unfortunate 'two-thirds or three-fifths' rule of proportion between senior and junior counsels' fees which has been discussed *ad nauseam* between the Bar and The Law Society. True, this rule applies equally in arbitrations as in court litigation, but before an arbitrator it is not quite so necessary to employ a silk. A good junior can do the work very well. The element of bluff and personal prestige, so important in a public court, seems not to count for anything like so much in the comparative privacy of chambers. At any rate, whether this or some other reason be the determining cause, there is little doubt that resort to arbitration is on the increase. Even the recent downward tendency of counsels' fees which reached their apogee in the days just after the war, when four-fifths of them would come out of the excess profits tax, has not much arrested the tendency. It is therefore well for lawyers in both branches of the profession to reconcile chambers to this growing tendency and to accustom chambers to expect that much of their work in future will take place before arbitrators. In Scotland, especially in Glasglow, where there exists a good deal of local jealousy of the Edinburgh courts and bar, the 'Arbiters' have gained almost the status of recognized authorities on Commercial Law. Their decisions are noted and practically followed as leading cases by other arbiters in similar sets of circumstances. Arbitration Law, therefore, is manifestly becoming perhaps the most important section of adjective, as distinguished from substantive, Commercial Law," (p. 251).

A RECENT ILLUSTRATION OF THE WAY IN WHICH THE COMMON LAW GROWS.

A recent Massachusetts case gives a rare and interesting emotion to the analyst of legal progress. The world does move, no matter what theologians and legalists say. Judicial law making does occur. But it is seldom indeed that one can catch the world of law upon moving day and observe the process. It is rather the habit of judges to move the law as secretly as possible.

Recently in Massachusetts an administrator sued an administrator. The decedent whom the plaintiff represented had rendered services in 1857 to a decedent represented by the defendant. The gap in the application of the statute of limitations was perfect. Anyone can demonstrate that no statute of limitations had run. Nevertheless the court held that in an ordinary common law action of contract a plaintiff could be and this plaintiff was barred by prescription which the court called laches.

The opinion itself does not give the data necessary to make one sure about the statute of limitations. The record in the Social Law Library is not entirely satisfactory. But the court assumed that the gap in the actual words of the statute was wide open, and relied not upon the statute but upon the thing which it called laches.

The pleadings were somewhat informal, and one count may have been an assertion of an equitable interest in a savings bank book which was the only asset of the estate, and which was claimed as a gift made on account of the same services which were sued for. This was correctly disposed of by citing Sawyer v. Cook, 188 Mass. 163 (1905).

But there was another count in common law for services rendered in 1857. The gap in the statutes may be seen by consulting *General Laws Chapter 260, section 10, and General Laws Chapter 197, section 9.*

It is enough to say that the suit brought July 18, 1922, was assumed to have been brought in time under the section last cited because there had not been administration early enough to set any statute running.

Hence we have in this case a new principle as part of the common law of Massachusetts. Actions at law may die of old age although not barred by any specific statute. Hitherto that doctrine has been confined to suits in equity, and the word used by the court here is a purely equitable word, "laches".

Of course this is by no means the first time that such a bold step about the limitations of actions has been taken by a court without the assistance of the Legislature.

It is interesting to compare *Wallace* v. *Fletcher,* 30 N. H. 434, where the court discusses the modern doctrine of a lost grant. Of course a lost grant is nothing but judicial law making of a new or extended statute of limitations.

Judge Bell in the New Hampshire case just cited says that this innovation may be traced back to the following two cases:

> *Finch* v. *Resbridge,* 2 Vernon (1709) in equity;
> *Lewis* v. *Price,* 2 William Saunders 175 note (1761) at common law.

Another instance of judicial law making is the extension of the statute of limitations (*21 James 1, C. 16, s. 3*) to instruments under seal. It was called a presumption of payment after twenty years time. But the presumption was conclusive.

In *Baker* v. *Langley,* the principal case commented upon, the cause of action was certainly stale enough to induce any court to discourage it. It is a pity that the remedy given in *Baker* v. *Langley* was so elaborate. An action at law was enjoined by a bill in equity. It would seem that it would be quite enough next time to allow the laches to be pleaded as an equitable defence.

RICHARD W. HALE,
DAVID BURSTEIN.

HIT OR MISS TAX ENFORCEMENT.

By HARVEY H. BUNDY.

(Reprinted by permission from "The Independent" of Nov. 22, 1924.)

In this day of high taxes, and particularly in connection with the Federal income tax, we hear much about the "tax evaders." We think of shifty-eyed men keeping two sets of books, one for the tax inspector and one telling the facts, falsifiers of returns, concealers of important assets, criminals legally and morally.

The word "evader" has a very unpleasant ring, and when a word is definitely unpleasant, the special pleader often finds it useful for his purpose. Because the ignorant are inclined to apply it to persons or measures they dislike, it is well to examine with care the real facts which a word with an unpleasant ring may help to conceal. An interesting illustration of the effect of words appears in the use of the word "bonus" by opponents, and the insistence on the phrase "adjusted compensation" by supporters of certain legislation.

Many honorable gentlemen who have so arranged their property as to avoid taxes have been damned as "tax evaders," and having been given the name, they have aroused the ire of congressional committees, Treasury officials, political orators, and many thousands of our countrymen. The pursuit has been thorough. Amendments to the law by the hundred have been suggested. "Evaders" must be destroyed even if it costs the government millions of dollars, even if thousands of shots aimed at them find a resting place in the bodies of innocent taxpaying bystanders, even if the "evader" is upon analysis shown to be doing business or holding property in a way which should remain free from taxes, and even if some of the principles upon which this government is supposed to rest are incidentally destroyed.

There have been many and salutary amendments in the last ten years, and, although there is no reason to doubt the integrity and honesty of purpose of the Internal Revenue Bureau, in their zeal to protect the government's interests, Treasury officials have too often failed to see the results which sometimes follow the effort to tax those who have rearranged their property so that they do not pay as large a tax as they otherwise would. The mere fact of change condemns them and makes them fair game, particularly when, because of the mere fact that they possess great wealth, the matter comes to the notice of the public in a striking manner.

For example, it is reported that William G. Rockefeller owned $44,000,000 of tax-exempt securities in addition to his taxable investments, and that he had borrowed $30,000,000; that in filing his income tax return, he deducted the interest paid on the borrowed money from his taxable income as permitted by the law and thereby reduced his Federal income taxes to a considerable degree. This has been called a terrible instance of tax evasion.

The Treasury last year proposed a remedy for such cases as this in an amendment which provided that interest paid by the taxpayer, or losses suffered by him, shall first be deducted from his income from tax-exempt securities. A chorus of approval greeted this proposal as a truly righteous amendment aimed at both tax evaders and tax-exempt securities, two birds which should be killed. The Treasury is praised for offering the stone to throw at them. It is worth while to examine just where the stone would hit, whether the birds are really birds of ill omen, as so many suppose them to be, and whether they are sitting in front of a plate-glass window.

In 1917, the United States Government sold to the patriotic investing public government bonds known as Liberty 3½ per cent bonds with a promise that they should be exempt from all Federal taxation. This was a promise made to all investors, rich and poor, to men who owned homes subject to mortgages and to those who owned their homes free and clear.

Relying on this promise, the issue was purchased from the government at a price based on the tax exemption, a much higher price than a taxable 3½ per cent security would have brought.

In 1923, the Treasury proposed that the government repudiate this promise and so limit it that those investors who own homes

subject to a mortgage can no longer have the benefit of the tax exemption on Liberty 3½ per cent bonds owned by them, and the true nature of the proposal was concealed by the statement that it was intended to prevent tax evasion.

Assume a taxpayer who receives taxable income of $10,000 a year. He owns a house subject to a mortgage upon which he pays interest of $2.000 a year. Under the present law, he pays a tax on a net income of $8,000. The Treasury proposed no change in this.

But suppose this same man rearranged his property so that instead of a taxable income of $10,000 he owned government 3½ per cent bonds bearing interest of $2,000 per year, and in addition, $8,000 of taxable income. Under the proposed amendment, he must deduct the $2,000 interest paid on his mortgage from his $2,000 tax-exempt income, and he pays a tax on an income of $8,000 exactly the same tax as that of the man with $10,000 income of which none is by promise tax exempt. The result is that the government's promise that the income from Liberty 3½ per cent bonds shall be free from tax has not been fulfilled, but has been evaded and repudiated. The Liberty bonds have not in effect been tax exempt in this man's hands. If the tax-exempt securities in question had been municipal or State bonds, the proposed remedy would by indirection have violated the Constitution, for the income from such securities is absolutely exempt from Federal taxation. This may or may not be a wise exemption, but a proposal to change it by constitutional amendment has recently been defeated in Congress after extended argument on its merits. Blinded by the hunt for the "evader," Congress is asked to deny the exemption by indirection and even with respect to securities already issued. As to the effect of such action on securities outstanding, it is in point to quote Secretary Mellon's recent letter to Congressman Frear written in another connection:

> Your bill affects existing securities in the hands of innocent holders. Tax exemption was a material factor in fixing the price at which these securities were sold to their present owners. As an example of what this means, the first Liberty 3½ per cent are fully tax exempt, the 4½ per cent of the same issue and maturity are exempt as to normal tax only. Based upon the average market price of these bonds during the last months, the removal of the exemption from surtax would drop the price from 99.7 per cent to 87.2 per cent, or a loss of $125 for a $1,000 bond.

and removal of the normal tax exemption would reduce the price further to 82.4 per cent, or a total loss of $173 on each $1,000 bond. A similar situation would, of course, exist in every municipal and State bond. This is the value of tax exemption sold and paid for. You propose to confiscate this value and to pay nothing for it. Irrespective of its validity, it seems to me such legislation would be dishonest.

Men have been called "evaders" of income taxes whose only evasion was that they died on a day during the calendar year other than December 31, midnight. It occurred to the pursuers that if a person who normally had an income of $20,000 a year died on June 30 having received an income of but $10,000, he would not be caught by such a high supertax as if he had lived the entire year. This shocking "evasion" was immediately cured by a summary remedy: a Treasury regulation so interpreting the law that the estate of a person rendering a return for but part of a year had to convert his return to an annual basis; for example, the man who died on June 30 will be assumed to be a $20,000 a year man and the supertax levied on that basis and then divided by two.

But again, the imagination of the doctor was deficient. The effect in practice was very extraordinary. Jones, a taxpayer, was an architect who had spent two years in the preparation of building plans. On January 1, 1924, he was paid a fee of $25,000 for his two years' work. He died of heart failure at midnight on January 1. He lived one day and, applying the Treasury rules, his income was to be multiplied by 365 days, and he was to be treated as paying the rate of supertax of a man having an annual income of $1,095,000 (an assumption quite contrary to facts). His income tax on an annual basis would be about forty to fifty per cent, or about $10,000 to $12,000 in taxes out of the $25,000 fee. The courts have upset this particular injustice, but the instance quoted is nevertheless illuminating as a clear example of the use of a bludgeon to kill a mosquito.

Another fertile field of the "evader" hunters is the Inheritance Tax Law. Inheritance taxes have a long history. They have been repeatedly attacked and repeatedly upheld and are now established in our law as a proper, simple, and not overburdensome method of raising revenue, although there is still much discussion as to whether it would not be wise to leave such taxes

to the several States. In reply to the contention that inheritance taxes are direct taxes and unconstitutional unless apportioned according to population, Mr. Justice Holmes has answered with characteristic brevity that they have for years been a well-known form of excise, and "a page of history is worth a volume of logic."

But inheritance taxes have not proved to be as productive as was hoped because people have a habit of giving their property away before they die. And some make gifts known as gifts *causa mortis* when they are critically ill, the donees being under an express or implied promise to give back the property if the sick man recovers. It was simple and natural for the act of Congress to include the latter type of gifts as taxable because their effectiveness depended on the happening of death. But the act has gone further and has levied a tax in general terms on gifts in contemplation of death and all gifts within two years prior to death are deemed *prima facie* gifts in contemplation of death. The courts have held that this means not merely gifts *causa mortis*, but that it means much more: that the word contemplation has a broad meaning and that the tax will depend on the state of mind of the giver. What a paradise of disputes—what glorious opportunities for differences of opinion! Was the giver contemplating death? What do the doctor's records show? What did he say to his friends? What was his daily life? At least one case was made to depend on the fact that the giver took a walking trip directly after making the gift, and this proved he didn't contemplate death. The department draws one inference, the executors another. The executors must pay the tax, claim a refund and litigate. Any tax which depends on facts about a state of mind concerning which there are sure to be radical differences of opinion which can only be settled before a jury is at least of doubtful wisdom and leads in practice to litigation.

Even this provision as to gifts in contemplation of death did not satisfy the "evader" hunters. The next step was the gift tax. And the reason assigned for it was that many people are giving away their property under circumstances where even the government must admit that the giver is not contemplating death. The "evader" is dying not possessed of all the property he might have had if he hadn't given it away. And to him was applied the new remedy of the gift tax.

If a gift tax is a proper, appropriate, and constitutional

method of raising revenue, by all means let us have a gift tax. Questions of the advantage of having property distributed by gift and of possibly unconstitutional direct taxation are obviously involved. The question should be argued on its merits and not as part of the hue and cry against tax evaders.

Suppose a man had given $100,000 to his son on January 1, 1924, to establish him in business. There was on January 1, 1924, no tax on gifts. But the "evader" hunter not only seeks to prevent future "evasion," but he is prepared to go to great lengths to catch the man who has already avoided taxes, and under the new law effective June 2, 1924, the tax on gifts is made retroactive to cover gifts made since December 31, 1923, and there would be a tax on the gift to the son. Similarly, the tax on gifts in contemplation of death is operative even when the gifts were made long prior to the passing of the act. There is something fundamentally shocking to the sense of justice in retroactive taxation just as there is in an *ex post facto* criminal statute. How can a man arrange his affairs safely unless he can now know the law affecting his actions?

Mr. Julius Amberg of the Michigan bar has pointed out very clearly in a most illuminating article in the *Harvard Law Review* for April, 1924, the constitutional question arising in retroactive taxation and argues forcibly that all taxes based on what has happened in the past are not excise taxes and must be direct property taxes and subject to the constitutional limitations on such taxes. To say that a tax is a privilege or excise tax when the act or privilege taxed has already happened is a negation in terms. The man who performed the act before the taxing act is passed was not performing a taxable act. When the tax becomes effective, the privilege has already been exercised and is history. For example, suppose a Federal tax on a man for branding a horse. If the tax does not go into effect until after the horse is branded, the tax is really a tax either on a branded horse or on a class of men who have branded horses, but in either case, a direct tax and not a tax on the doing of a business.

Other retroactive taxes have been suggested in the hunt for evaders. For example, since the Supreme Court held that stock dividends were not income at all, legislators have been racking their brains to catch "evaders" who received these stock dividends and the corporation who declared them. And so they have proposed taxes on undistributed corporate surpluses. These

taxes are at present limited to unreasonable surpluses built up to evade supertaxes and are aimed at a form of "evasion" other than the stock dividend "evasion." Who is to determine what is reasonable and what is the intent to evade? An assiduous tax official and, if the taxpayer is stubborn, the eventual judge or the jury of twelve men. Again, we have uncertainty of operation. Apart from the question of certainty, the writer is not here undertaking to quarrel with the taxation of corporate surpluses, if it be the desire of Congress to do so. But he does protest against clouding the issue by bringing in the emotional element arising from calling corporations with surpluses tax "evaders" without defining just what evasion means in the particular case.

It is the right and the duty of taxpayers to insist that when remedies for tax evasion are offered, certain questions shall be asked: First, does the remedy tend to certainty or uncertainty in administration? Second, is the remedy honorable and in accord with the promises of the government? Third, does the remedy accomplish by indirection and pretense a result which if called by its right name should be a separate and independent tax proposal to be argued on its merits?

If it is not satisfactory in any of these respects, not only should it fail for that reason, but it will not prevent tax evasion.

The taxpayer tends to become a tax evader in the worst sense of the word whenever he begins to feel that uncertainty makes the administration of a law arbitrary, or when he feels either that repudiation of a promise makes a law dishonest, or that a result with which he disagrees is accomplished by subterfuge and pretense.

Ninety-nine out of a hundred taxpayers are honest. The law is not honored in its breach like the Volstead Act in many parts of the country. But the kind of emotional calling of names which results in blanket efforts to remedy minor defects at the expense of injustice to many innocent persons will arouse increasing resentment. It is every lawyer's experience that an angry client is not overscrupulous or frank in his business dealings with a person whom he considers dishonest or overreaching.

Note.

For other discussion of the doubtful legality of arbitrary Federal taxation whether "retroactive" or not, see QUARTERLY for May, 1924, pp. 78-83.

ANOTHER ILLEGAL PROVISION IN THE FEDERAL TAX LAW?

The Federal income tax act of 1924 provides in s. 204 (a) as follows, in regard to determining gain or loss:

> "The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—
>
> (1) If the property should have been included in the last inventory value thereof;
>
> (2) If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;" . . .

The effect of this provision seems to be to tax as a gain constituting part of the income of the donee something which he received, not as income but as a gift, namely, the difference between the cost of the property to the donor and its market value at the time of the gift. This seems a purely arbitrary provision with no reasonable basis. The fact that the provision also allows the donee a deduction for a loss on the same basis in case of sale by the donee for less than the original cost to the donor does not help it. It is an indirect attempt to impose another form of "gift tax", this time on the donee.

But, considered as a gift tax, it imposes on different donees of property of equal value at the time of the gift a variable tax, the variations of which are not based on a "material fact" warranting such discrimination. To illustrate this, let us take an example:

> A buys property for $1,000. Five years later this property has increased in market value to $3,000 and is then

given by A to B. B then sells the property for $3,000 and is taxed on a gain of $2,000 as part of his income.

C buys property for $3,000 and five years later the market value of the property is $3,000. C then gives the property to D, who sells it for $3,000 and is not taxed at all because there is no gain.

E buys property at $3,000. Five years later the market value has dropped to $1,000 and E gives it to F at that time. F sells it for that amount. E is not only not taxed at all, but is given a deduction for a loss of $2,000 which he never sustained.

G buys property at $1,000. Five years later the market value has increased to $3,000 and he gives it to H at that value. Shortly after the gift, the market value drops back to $1,000 and H sells it. H is not taxed, but is not allowed a deduction for any loss because the cost to the original donor was $1,000 although H has actually sustained a loss of $2,000.

Now, considering this provision as a gift tax on the donee aside from the constitutional question of the power of Congress to impose a tax on gifts *inter vivos* this variable rate of taxation on donees of gifts seems peculiar, to say the least. In three of the cases stated, the value at the time of the gifts in each case is exactly the same, but the tax is different. In the fourth case, that of E and F, the amount of the gift is arbitrarily increased by the government by the allowance of a deduction for a loss which the donee never sustained, thus relieving him from a tax on that amount of his other taxable gains.

If this is not arbitrary taxation in an unconstitutional sense, it is difficult to see the reason why it is not. It is submitted that the provision is invalid and that the only legal basis for figuring gain or loss and computing the income tax of the donee is the value of the property at the time the donee received it.

In the cases put, the tax on B seems to be not only a "direct" tax not authorized by the income tax amendment because it reduces the value of his gift by taxing him on a gain which he never received, but it seems a purely "arbitrary" extortion without due process of law because he is taxed while D and F, who are in the same class with him because the amount of their gifts in each case was exactly the same, are not taxed. The Income Tax Amendment does not authorize Congress to tax B for a gain on A's property as if it was a part of B's income.

A similar arbitrary result appears in the case of H, although there the process is more indirect because H is made the subject of

discrimination by the failure to allow him a deduction for a loss which he actually sustained when F is given a deduction for a loss which he never sustained at all. Further, in the case of F, by allowing him the deduction he is granted a special favor which in substance amounts to a gift from the government to him. Gifts, as gifts, are not made taxable to the donee by the income tax law. The tax on B, therefore, seems to be as direct and arbitrary as would be a poll tax on red-haired men. In the matter of *deductions* possibly Congress may have more power to make arbitrary discriminations but this kind of arbitrariness seems bad policy.

F. W. G.

STILL ANOTHER SIDE-LIGHT ON AN ELECTIVE JUDICIARY.

The Editor has received the following story from an eye witness:

A stranger in New York City one week before the recent election, about to cross Broadway at eight in the evening, is suddenly halted by a traffic officer. Far down the street he hears a loud commotion, which he takes to be the clang and roar of fire apparatus. The crowd surges back to the sidewalk and traffic is halted.

After a minute has passed along comes a procession of automobiles, a dozen trucks and touring cars, filled with adults and children. The occupants are blowing horns, exploding bombs with a terrific detonation, throwing confetti, shouting and cheering, endeavoring to give an impression of great jubilation.

What is it all about? Large banners on the cars bear the legend—

"VOTE FOR————FOR JUDGE."

Oh! Now we understand. New York is thus proceeding about the weighty business of electing its judges. And even for a candidate for election to the bench, the motto holds—

"IT PAYS TO ADVERTISE."

Do we want this kind of thing in Massachusetts?

F. W. G.

THE PROFESSIONAL CONTRIBUTIONS OF URIEL H. CROCKER.

I. "Notes on Common Forms."

Boston, January 9, 1925.

Editor Massachusetts Law Quarterly:

Crocker's "Notes on Common Forms" was originally published many years ago, and has since been revised five different times, each time making the book more useful. The last edition was in 1913. There is no other book in Massachusetts which is so useful to the ordinary practitioner. It was originally intended as a conveyancer's handbook, and dealt with the common forms of deeds, leases, various notices, agreements for the sale of real estate, agreements for party walls, etc. It also covered the common forms used in connection with personal property, *e. g.*, bills of sale, chattel mortgages, various copyright forms, powers of attorney, and wills.

Recently, George U. Crocker, Esq., decided that in order to perpetuate the book, the copyright should be conveyed to trustees. This was done, the conveyance being made to Samuel T. Harris, Wilmot R. Evans, Jr., and Albert L. Partridge under a simple declaration of trust, the purpose being to perpetuate the book. In furtherance of this policy, and with the approval of Mr. Crocker, an agreement has been made with Arthur V. Getchell, Esq., of Boston to revise, re-edit, and republish an entirely new edition. Probably the form of the other editions will be followed, although all new material will be included in the text, rather than in an appendix. It is intended to bring the entire book up to date, and include all recent decisions of the Massachusetts Supreme Judicial Court. Various other matters are contemplated, *e. g.*, it is expected that a list of all wills which have been passed on by the Supreme Judicial Court will be included.

The announcement of the new edition was made at a recent meeting of the Massachusetts Conveyancers Association, and many members volunteered their assistance by giving Mr. Getchell copies of such notes as might be difficult otherwise to secure. It is hoped that members of the bar throughout the state will send Mr. Getchell any material which will be of assistance to him, that the new edition may be as complete as possible.

Mr. Getchell's address is Boston.

Yours truly,

Wilmot R. Evans, Jr.

II. Crocker's Notes on the Statutes.

The foregoing letter also reminds us of Mr. Crocker's other valuable contribution to the profession, a new edition of which has just appeared and as many people, even otherwise careful readers, seem to have a chronic habit of never looking at a preface we quote in full the "Preface" to the new edition of Crocker's "Notes on the General Laws" as follows:

"Preface.

"My father, Uriel H. Crocker, began his work on these Notes in 1860, and they were first published by Little, Brown & Company in 1869.

"Up to the time of his death in 1902, my father read all of the Massachusetts reports, making notes of all decisions in this book and in his other book,—'Notes on Common Forms'.

"Having come into possession of the copyright, and having received many expressions of appreciation as to the value of the work and of a desire for a new edition, I have employed Raymond C. Baldes, Esq., to undertake the very laborious task of re-arrangement and editing. This volume contains notes of cases in all the volumes of the Massachusetts Reports down to and including Volume No. 244.

"Such a book as this, treating of Massachusetts Statute Law only, has necessarily a very limited sale. It was never, therefore, a source of financial profit to my father, and the publication of the present edition is not likely to be profitable either to the publishers or to me. For this reason, any edition which the legal profession may desire in the future must be prepared in some co-operative way.

George Uriel Crocker."

Boston, Massachusetts.
September, 1924.

PERHAPS THE MOST INTERESTING LETTER WHICH HAS APPEARED ON THE "CHILD LABOR" AMENDMENT.

In the August number we printed arguments for and against the "Child Labor" Amendment, so-called. The advisory vote at the State election was 247,221 *for* and 696,119 *against*, showing a tremendous majority against the amendment for the information of the Legislature. The debate on the subject in the newspapers for a month or two before election was one of the fullest and for that

reason healthiest debates on any measure submitted to popular vote in the history of the Commonwealth. It is not our intention to fill up the pages of this magazine with continued discussions of the subject, but as one letter stood out in the minds of many as the most interesting communication that appeared it is reprinted here for that reason. Mr. Lee's well-known interest in helping children adds peculiar force to his letter.

CHILD LABOR AND LOCAL RESPONSIBILITY.

Transcript, Oct. 14, 1924.

To the Editor of the Transcript:

I am opposed to the child labor amendment because I am and always have been in favor of the regulation of child labor, and because I believe that national legislation upon the subject will, in the end, largely supersede legislation by the several States, while itself necessarily lacking in that local support and that adaption to local conditions upon which the effectiveness of all such measures must depend.

Child labor, as both the supporters and opponents of the amendment are agreed, is primarily an educational undertaking. It cannot be successfully carried out except in close co-operation with the public school and with the home. To exclude a child from work without at the same time providing him with a school is to decree that he shall grow up in enforced idleness, a prey to evil influence. To determine the sort of schooling that shall be provided, moreover, and the ages at which it shall be provided for different kinds of children, is far from being a simple matter. Some children, for instance, can get very little benefit from schooling after their fourteenth year and none at all unless they also have the experience of actual work. For others the limit is fifteen years, for others sixteen, for others 20, 22, or 27. For some the best kind of education outside of the home is through that form a part-time schooling in which two boys occupy one work-bench in the factory and one seat in the school, changing positions like Box and Cox at the beginning of each month. In other cases the best plan is that of the continuation school—say for from eight to twelve hours a week. In others the evening school will be sufficient. So that to work effectively a child labor law must be accompanied by a corresponding school law and also by the provision of especial educational opportunities in local industries for certain classes of children. The working out of such a system is an intricate piece of business, its successful development depending very much on local conditions. In order to be accomplished satisfactorily it must be a matter of growth and

adjustment, not of national legislative fiat applying to all parts at the same time.

Under the proposed amendment Congress would indeed have the power to decree what sort of schooling should be provided in the several States to fit in with the labor legislation it might adopt. But no constitutional amendment can give to Congress the power of understanding local conditions and of carrying local opinion along with it, nor the power of adapting its legislation in each State to the particular conditions obtaining in that State, such as our State Legislatures possess. A law suited to Massachusetts might not fit Arizona; one adapted to the conditions in a Southern State like Georgia might not be the best for Wyoming. It is true that the States affected by a national law might of their own voluntary action organize their schools and other educational provisions to conform to it so far as possible. But the purpose of this amendment is to enforce child labor legislation upon States who do not want it now, and it is not certain that they will be eager, when a law is thus forced upon them, to extend their educational system to correspond.

There must also be co-ordination between child labor legislation and the home. The child excluded from work may be the family bread-winner. It is often desirable that he should, nevertheless, be excluded, but it is not desirable that in that case the family should starve. The State is a much more appropriate, and, in the long run, more efficient, body to control the matter of poor relief within its own borders than officials appointed from Washington can ever be.

The greatest objection, however, to national legislation upon the subject is that by lessening the responsibility of the States for dealing with the matter, it will inevitably weaken the effect of local agitation and the corresponding development of that local public sentiment upon which the effectiveness of all laws must ultimately depend. Without national legislation our laws regulating child labor in the several States have rapidly advanced. They will continue to do so if this amendment is not passed, and they will in that case retain the advantage of being effectively enforced. This amendment tends to dry up at their source the springs of public opinion from which, in the long run, all progressive legislation must proceed.

JOSEPH LEE.

CAN CONGRESS OR A STATE LEGISLATURE CHANGE ITS MIND IN REGARD TO RATIFICATION OF CONSTITUTIONAL AMENDMENTS?

(From Springfield Union of Feb. 2, 1925.)

In your editorial of Jan. 29 on the "Child Labor" amendment, you make the positive statement that "under the method of ratifying proposed amendments . . . the action of a State that votes to ratify is final, whereas there is no finality in the case of a State that declares itself against ratification." I respectfully question this statement. The only authority for it, I think, is congressional practise which was described in 1919 in an advisory opinion of the Justices of the Supreme Judicial Court of Maine. They said:

> It is interesting to note in this connection, as an historical fact demonstrating the attitude of the Federal Government, that according to their admitted and accepted practise if a State Legislature has once ratified a federal amendment a subsequent legislature has no power to rescind such ratification. Such recision was attempted by Ohio and New Jersey with reference to the 14th Amendment and by New York with reference to the Fifteenth; but the proclamation of the Secretary of State for the United States was issued, announcing the final adoption of the amendments as a part of the Federal Constitution notwithstanding the attempted recision by subsequent legislatures. The attempted recision was ignored. Watson, Const. vol. 2, p. 1315.

As far as I am aware, there has never been any decision that the so-called "accepted practise" as to the revocation of a ratification of an amendment by a subsequent legislature is a sound one. For that practise, the court refers to "Watson on the Constitution," where the action of Secretary Seward and of Congress in refusing to recognize the revocation of Ohio and New Jersey in regard to the 14th Amendment is set forth. But, there is no discussion in the opinion as to the soundness of this action, and the ratification of those States in regard to the 14th Amendment was not needed to put the amendment in force as a matter of law, as there were a sufficient number of ratifying States without them. That amendment was adopted under peculiar circumstances during the reconstruction days after the Civil War, and the practise under those peculiar political conditions can hardly be accepted as a final settlement of this far-reaching question. The history of the Civil War

amendments as told by Prof. Burgess' volume on "Reconstruction and the Constitution" is worth reading in this connection.

Mr. Watson, in his book, to which the court refers, does not discuss the subject fully. Mr. Jameson, in his book on "Constitutional Conventions," expresses the same view, but he is not convincing in his discussion.

What sound reason is there for saying that ratification by a State legislature is irrevocable if a succeeding legislature votes to revoke before the requisite number of States have ratified?

Certainly it seems peculiar if a State can change its mind in favor of it cannot also change its mind against ratification. Is not the notion that a State can change its mind in only one direction a most stultifying doctrine to apply in these days to the representatives of the people of the United States? How do the people differ from an individual in this respect?

This discussion is not confined in any sense to the "child labor" amendment. No one knows what amendments may be submitted in future as the result of political excitement; and, if the entire national structure is to be submitted to the hasty political action of State legislatures without any opportunity for reconsideration, the country may wake up and find itself in a most serious situation some day.

Mr. Watson quotes certain passages from Madison and Hamilton in regard to the original ratifying conventions in the States, but these passages had to do with original adoption and not with the interpretation of the Fifth Article relating to changes after the original instrument was adopted. While the opinion of Madison and Hamilton may, perhaps, be fairly cited in support of the proposition that if special conventions are called to consider an amendment by direction of Congress they exhaust the authority of the people of the State to act on a particular amendment when the convention has either ratified or refused to ratify and has adjourned, neither of these men, who had so much to do with the making of the nation, can be cited, so far as I am aware, in support of a similar rule as applied to the action of State legislatures when Congress specifies that method of expression.

Secretary Seward himself expressed a doubt whether the action of the legislatures of Ohio and New Jersey in revoking a previous ratification before the requisite number of States had ratified might not be effectual in withdrawing the consent of those States. This appears in his announcement of July 20, 1868, which is quoted in

vol. II, of Watson's book on the Constitution, pp. 1314-15, as follows:

> "WHEREAS, no law expressly or by conclusive implication authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of state legislatures, or as to the power of any state legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution, and
>
> "WHEREAS, it further appears that the Legislatures of two of the States, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or either of them to the aforesaid amendments.
>
> "Now, therefore be it known that I . . . do hereby certify that if the resolutions of the Legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the Legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States."

On the following day, however, Congress passed a concurrent resolution

> "That the following States, including Ohio and New Jersey, having ratified the fourteenth article of amendment to the Constitution of the United States; therefore, be it resolved that said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."

Secretary Seward then issued another proclamation certifying that

> "The said amendment has become valid to all intents and purposes to the amendments of the Constitution."

The only precedent, therefore, in regard to this matter appears to be this joint resolution of Congress adopted during a time of great political excitement in the face of doubt publicly expressed

by so able a lawyer as William H. Seward, and adopted, as pointed out by Burgess, when the ratification of Ohio and New Jersey does not appear to have been necessary for the ratification of the amendment.

While no attempt has been made in this letter at an exhaustive study of this question which its importance may deserve, yet, the question is of such great and growing importance that it deserves to be called to the attention of the bar of the country in order to provoke discussion before the subject is disposed of by judicial acceptance of the somewhat dogmatic statements and the inadequate reasonings of text writers, when William H. Seward officially expressed doubt upon the question.

In order to provoke discussion, therefore, I respectfully submit that there is no "accepted practise" of a nature to justify the statement in your editorial and that the question of constitutional law is still open and not in any sense affected by any action hitherto taken by Congress. The subject is discussed in more detail in the MASSACHUSETTS LAW QUARTERLY for August, 1919, pp. 350-365.

In view of the essentially deliberative and continuing character of the function performed by Congress in submitting amendments, there seems to be no reason in the nature of the function, or in the relations between Congress and the States, why, after an amendment has been submitted by one Congress the same or some succeeding Congress should not revoke the submission if the requisite number of States have not ratified such amendment prior to such revocation. In other words, the process of amending the Constitution of the United States on behalf of the people of the United States through Congress and the State Legislatures is a joint deliberative function requiring *the concurrent and continuing assent* of Congress and of three-fourths of the States.

It is submitted that the people of the United States, as represented as a whole by Congress and in separate parts by their State Legislatures, have a right to change their minds at any time on such a question before the number of assents specified in Article 5 is reached, just as much as any member of Congress or of any State Legislature, in representing the people, has a right to change his mind and change his vote on a roll call after he has once voted, *before the final vote is announced.*

F. W. GRINNELL.

BOSTON, Jan. 31, 1925.

The Constitution of the United States, as framed by the fathers of the Republic, would long ago have become as jumbled and unintelligible as a billboard if all the tinkers had been given their way in the matter of amendments, and instead of nineteen there probably would be ninety.

FOURTEEN THOUSAND BILLS.

(*From the New York World of Dec. 7, 1924.*)

"When one William J. Cary of Wisconsin rose to his feet in a recent session of Congress and introduced a bill to move the White House to Milwaukee no one took his measure seriously or expected it to pass. It is the mode in Washington to introduce bills which no one takes seriously or expects to pass, least of all the authors of the bills. Activity of this sort comes under the head of pleasing one's constituents.

"In its news columns last week *The World* pointed out that the amazing total of 14,398 bills aspiring to become laws had been introduced in the present Congress, most of them still on the calendar, and that this total meant a new bill written every four minutes while Congress was in session. These are impressive figures. No other nation matches them. That any group of men in public life should actually consider this overlegislated country in need of another 14,000 laws on top of those already written on its statute books is a fact which helps explain the impotence shown by Congress on occasion. For, caught in the cogs of legislative program so vast that twenty Congresses could not give its items first-hand consideration, Congress perpetually faces the problem of how to log-roll private interests so as to have a chance to deal with public business before adjournment comes. From two great streams a mass of detail pours forth steadily to clog the calendar of each new Congress.

"The first of these is the legislation introduced for home consumption. Here are the bills to build big public buildings in small towns and dredge rivers which no one hopes to see made arteries of trade. This legislation Washington calls "pork." With it go each year a thousand minor bills content with asking little: bills to give Marysville a German cannon and to help Jamestown find a navy anchor for its park. Sometimes the effort is more ambitious. This Mr. Cary of Milwaukee who sought to move the capital to his home town asked Congress in the same session for an armor plant, a Federal office building, a fish hatchery, a cannon and an avenue of street lamps. The case is not exceptional. Congressmen go far to please. When bathers on the coast of Jersey were harassed by sharks one summer, Representative

Bacharach of the Second District introduced a bill to make all Jersey sharks illegal.

"For a good many years Congress has catered to its public with this sort of legislation; free seeds, marble copings and free dredging are familiar friends. But either because these bills are too far-reaching to require second thought once they are put in type, or because they follow some set formula which permits them to be disposed of by the dozen, it is probable that they do not cut into the time and energies of Congress as heavily as their vast volume would suggest. A more important factor lies in another field. It consists of countless small experiments in administering the law as well as writing it.

"The degree to which Congress has staked itself to this adventure is not suspected by the public. Those of us who remember what we were taught in school believe that there are three entirely separate branches of government in the United States—the legislative, the executive and the judicial—and that Congress is the first of these, and the first only. Congress has never thought so. It not only legislates but attempts, with all the confusion certain to be characteristic of 531 men attempting to act in concert as executives, to administrate as well. The calendar of every session is loaded down with bills of an administrative nature: bills to make exceptions in Federal appointments, bills to change mail routes, bills to restore retired army officers to the active list, bills to take wooden pickets off a fence and put iron pickets in their place. These bills are debated on the floors of Congress while legislative matters wait. In recent sessions Congress has devoted entire days to discussion of such points as these: whether or not the rooms in the London Embassy are large enough for comfort; whether or not the sum of $108.75 should be refunded to a creditor; whether or not pneumatic mail tubes are efficient; whether or not the cultivation of pecan nuts is a profitable enterprise for the Southern farmer.

"It is clear that two experts on pecan nuts and pneumatic mail tubes can tell Congress more in five minutes on those subjects than several hundred wrangling members can tell themselves in a whole session. But the will to administrate persists. Congress will write a Tax Law so vague that the courts must really do the legislating after Congress gives it up. But Congress, often pleading that it has no time to legislate accurately and intelligently, will find time meanwhile to usurp the functions of the

Executive. And not to understand that fact is not to understand Congress.

"Two classes of legislation explain the calendar of 14,000 bills which face the present Congress.

"There are the private bills addressed to home constituencies, which will continue to be written by the thousand until those constituencies no longer look to Congress as a source of special favors.

"There are the bills administering anything and everything, which will continue to distract Congress until that body no longer seeks to usurp duties which do not belong to it and takes up more seriously those which do."

Note.

The facts thus stated should make the American people pause and reflect when it is suggested that Congress be given more power over more things by constitutional amendment.

F. W. G.

TRIAL BY JURY IN MARYLAND.

(*From the Baltimore Sun of Dec. 26, 1924.*)

"Last year in the criminals courts of Baltimore less than ten per cent. of the citizens accused of crime were tried before a jury. More than ninety per cent. elected to have the charges against them heard before a judge alone. But it is to be emphasized that every defendant was given his free choice as to whether he should be tried before a jury. The fundamental right of trial by jury was in every case fully recognized.

"It is doubtless a compliment to the fairness and the wisdom of the judges of the Supreme Bench of Baltimore City that so large a percentage of traversers should elect to leave the decision in their hands.

"But it is, after all, simply another example of the tolerance and liberality with which such matters are arranged in the Maryland Free State, that here, quite against the general rule, a defendant may make free choice as to whether his case shall be heard by a jury or the court alone. Elsewhere, generally speaking, the rule is rigid, except in cases of pleas of guilty, that a jury shall be called."

The *Sun* of Dec. 29th gave the following figures:

"In 1923 out of 4,442 cases called for trial, jury trials were asked in 436 or 9.8 per cent. This year out of 5,043 cases called jury trials were asked in only 195, or 3.8 per cent."

The Daily Record of January 6, 1925, prints the report of the clerk of the Criminal Court of Baltimore, containing the following passages:

"Of the disposed of cases there were 3,722 convictions, 610 acquittals, 176 jury trials and 4,163 court trials—there were 2,188 white persons tried, 1,535 colored persons; 3,388 males and 335 females. . . .

"The following is the number of classified cases disposed of during the year:

Abortion	3
Arson	2
Assault to murder, etc.	310
Assault to rape	11
Attempt burglary	11
Assault to rob	26
Attempt to rob	3
Bastardy	117
Bigamy	12
Burglary	588
Carnal knowledge	17
Common thief	6
Compensation law	3
Conspiracy	46
Deadly weapon	80
Desertion	774
Disorderly house	51
Embezzlement	107
False pretense	282
Forgery	146
Bets on races, gambling, etc.	178
Incest	1
Kidnapping, abducting female minor	6
Larceny	1443
Liquor, no license	19
Mayhem	4
Unlawful practice of medicine	2
Miscellaneous, ordinances, etc.	330
Murder	80
Obstructing justice, interfering with police officer	7
Violation optometry law	2
Pandering	3

Perjury	3
Pickpocket, attempt at larceny	11
Prostitution	50
Rape	66
Receiving stolen goods	82
Robbery	166
Selling cocaine	2
Sodomy, perverted sexual practise	12
Vagrant	27

Respectfully,

ELMER J. HAMMER,
Chief Clerk."

A PRACTICAL SUGGESTION FOR THE FEDERAL GOVERNMENT.

In an interesting little book by an anonymous author recently published by E. P. Dutton Company, entitled, "Behind the Scenes in Politics," there appears the following comment and practical suggestion. In the chapter entitled, "In the Trail of an Election," reference is made to the strain on the President of the United States and to the fact that after a year or two it is "No wonder that some of the bloom has gone from a man" after he is elected to the presidency.

"The job is too big and, it has developed in the last twenty years, too lacking in any dependable assistance and too devoid of any buffers to take the shocks of criticism and to turn aside intrigue and to balance for the President the relation of what he may put out with that which he ought to take in. . . .

"After watching the trail of several national elections, I think I would say to a successful executive who had been blessed by victory, 'Your first job is to make your job easier.'

"In the case of the presidency, the elected candidate would face certain inevitable limitations in this endeavor. For instance, I can conceive of no way of erecting a buffer between the President and senators and congressmen. If the secretary ever served to any extent this function, the function has gone. Secretaries of the President are always occupied chiefly in arranging for people to see the President and not in arranging for people not to see him. No matter how competent a secretary may be, the present arrangement finds him more of a clerk than a secretary, and less of a clerk than a kind of glad-hander of people who really never expect to get beyond the ante-chamber. He may take care of the people who say, as they have prepared to say beforehand, 'Well,

you tell the big chief I just came in to present my respects.' In these days it would take a miracle secretary who could stop a senator or find any time to solve a problem or negotiate a confidential matter for his principal, or adjust a quarrel between administrative departments, or be capable of writing special letters which could be accepted as carrying all the qualities of kindliness, wisdom and foresight which would flow from the presidential hand itself.

"What is needed is a new, big job. It will come into being some day. It will aid in marked ways the efficiency of a President. It will pull some of the strings of victory. It will make the trail of an election an easier, rosier path. What is needed is an officer called Secretary of the Cabinet.

"The Secretary of the Cabinet, were he able and active, could take off the shoulders of the President a third of the labors resting there now. The Secretary of the Cabinet would prepare all discussions for Cabinet meetings, would adjust frictions in the administrative department of the Government. He would be no clerk, no glad-hander, no telephone-call man. Therefore he would have time, if he had the ability, to think. In crises it would be this Secretary of the Cabinet who would gather information about a strike or a foreign policy or a financial program, and be the first to see the men who offered information. If he were any good he would save Presidents. If he were any good he would cut the time of Cabinet meetings in half and double their efficiency. If he were any good he would give a President a chance to balance his incoming facts and his outgoing ideas.

"Well, there is no such man now.

"In his absence a President must enjoy his job. This is said advisedly. The people intensely desire that a President should enjoy his job. If he is in pain he ought to conceal it. As human experience goes, the presidency is quite an experience. Most men and women, knowing that they would take the job, are eager to have the man who is in it enjoying it."

LEGAL AID AND THE LEAGUE OF NATIONS.

The legal aid organizations of the United States in the prosecution of their work in behalf of poor persons constantly find themselves confronted with cases where some investigation or legal action must be taken in a foreign country if full justice is to be done. In a country with so large an immigrant population as ours it is reasonable to believe that there are thousands of such cases every year arising especially in connection with the settlement of small estates, the collection of debts, the award of workmen's compensation to dependents, seamen's claims, and in the adjudication of domestic relations problems such as divorce, desertion, and illegitimacy.

In every civilized country some system, more or less adequate, for giving legal assistance to poor persons has been devised. The National Association of Legal Aid Organizations came to the conclusion that if all such legal aid agencies in the world could be discovered and listed it would then become possible to interchange cases, to co-operate on cases, and thus to make some workable provision for these international legal problems of poor persons.

Dean John H. Wigmore a Vice-President of the National Association of Legal Aid Organizations, while at Geneva in 1923 brought this idea to the attention of the Assembly of the League of Nations which promptly authorized the Secretary-General of the League to make inquiries and to report back to the Assembly what action, if any, it might be desirable for the League to take.

The Secretary-General made his inquiry by convening, under authority of the Council of the League, a small group of experts who met at Geneva in August, 1924. Representatives from England, France, Italy, Japan, Norway, Poland, Spain and the United States deliberated for a week and adopted certain specific recommendations which with minor changes were adopted by the Assembly of the League in September, 1924.

The text of the resolution adopted by the Assembly is hereto annexed.

R. H. S.

[Communicated to the Council, the Members of the League and the Delegates at the Assembly.]

A. 91. 1924. V.

GENEVA, September 20th, 1924.

FIFTH ASSEMBLY OF THE LEAGUE OF NATIONS.

LEGAL ASSISTANCE FOR THE POOR.

Resolution

adopted (on the Report of the First Committee) by the Assembly at its meeting held on Saturday, September 20th, 1924 (morning).

The Assembly decides:

1. To invite the Secretariat to prepare a list of the agencies, both public and private, which have been established in each country for the purpose of giving to poor persons legal assistance in connection with litigation in the courts or free legal advice and consul-

tation; and of international organisations that are interested in providing or securing legal assistance to poor persons.

This list shall be printed and distributed to the various Governments and be available for the agencies named therein and for other interested institutions.

This list shall be revised by the Secretariat from time to time in order that it may mention agencies that may hereafter be established or abolished.

2. To invite the Secretariat to collect the various treaties, laws, and other provisions regulating legal assistance to poor persons in the various nations.

Such treaties, laws and other provisions or summaries thereof shall be published and distributed to the various Governments and be made available to the agencies mentioned in the list of legal-aid associations and to other interested institutions.

3. To invite each Government to nominate an authority or other duly qualified person who will answer enquiries for authorities or other duly qualified persons in other countries, with regard to the facilities afforded in the country applied to for giving legal advice and assistance in litigation to poor persons in other countries.

The list of authorities or persons so designated by the various Governments shall be published by the Secretariat from time to time.

4. To request the Secretary-General of the League of Nations to ask the various States, including States not Members of the League, whether they would be disposed to become parties to a Convention dealing with free legal aid for the poor on the basis of the principles formulated in Articles 20 to 23 of the Hague Convention, of July 17th, 1905, and whether possibly they would desire to propose any modification of such principles.

5. To request the Secretary-General to transmit to the Governments the report A.34.1924.V., concerning international arrangements for legal assistance for the poor.

THE JUDGE'S SENTENCE IN THE LOEB-LEOPOLD MURDER.

(Reprinted by permission from the Illinois Law Review.)

1. In the judicial opinion giving reasons for imposing less than the extreme sentence for murder in the Loeb-Leopold case, the court was "moved chiefly by the consideration of the *age of the defendants*—boys of 18 and 19 years, . . . persons who are not of full age." Declaring that the court's judgment "is not affected" by the psychiatrists' analysis of the "physical, mental and moral condition of the two defendants," and dwelling exclusively on their age, the court points out that the mitigation of penalty based on that circumstance alone "appears to be in accordance with [1] the progress of criminal law all over the world and [2] the dictates of enlightened humanity." The opinion adds that the life-imprisonment penalty "may well be the severer form of retribution and expiation."

These astonishing pronouncements, with their incidental reference to "progress of criminal law," "humanity," "expiation," "retribution," evidently were logical consequences of some conceptions, in the judicial mind, of the purpose of the penal law. Let us therefore briefly glance at the well-known state of theory on that subject.

2. The theories of the basis of penal law are all reducible to four—Retribution, Reformation, Deterrence, Prevention. But the last of the four—the preventive basis—does not concern the law and the courts; it concerns the general social measures—such as education and eugenics—which will eliminate or diminish the tendencies to crime; hence it is here immaterial. There remain the theories of Retribution, Reformation and Deterrence.

The *retribution* theory was once dominant, centuries ago. It had a theological origin, but has long been discarded. Probably the last writer to advocate it frankly was Thomas Carlyle. In his Latter Day Pamphlets, he says, "There is one valid reason, and only one, for punishing" a murderer with death, and that is that nature "has planted natural wrath against him in every God-created human heart. Caitiff! we hate thee—not with a diabolic, but a divine hatred. In the name of God, not with joy and exulta-

tion, but with sorrow stern as thy own, we will hang thee on Wednesday next!'' But nobody defends this theory any longer.

Why, then, does the opinion in the Loeb-Leopold Case refer to a life sentence as ''the severer form of *retribution* and *expiation?*'' Those terms are discarded—and discarded by the very ''progress of the criminal law'' elsewhere invoked in the same opinion.

There is indeed one aspect in which the retribution idea still legitimately has a bearing, viz., not in initially fixing the penalty, but in *rebutting a plea for mitigation.* ''We do pray for mercy,'' says Portia, ''and that same prayer doth teach us all to render the deeds of mercy.'' He who asks for mercy is met by the retributive answer, ''You yourself showed no mercy.'' So in a homicide case: The atrocious killer, if he asks for mitigation, is answered: ''Who are *you,* to ask for mercy, that showed no mercy to others?'' From the killer's point of view the retribution idea is a sufficient answer. And so it should have been in the Loeb-Leopold Case.

But *that* theory does not tell the law how to fix the penalty in the first instance. And so we come to the other two theories.

The *reformation* theory is the proper basis for shaping any and all penalties, so far as concerns the individual at bar. It may lead to permanent segregation from society, at one end, or to immediate discharge on probation, at the other end. All modern criminal law has been modified, in obedience to this theory. In the Loeb-Leopold Case it would lead to no mitigation; for there was no evidence at all that these men would ever reform. The evidence was all to the contrary. Their philosophy of life was fixed; they had been developed by the highest education; their cynical, callous unscrupulousness revealed them as irreclaimable.

But this reformation theory affects solely the *individual at bar.* It takes no account of the mass of humans outside. The criminal law is quite as much concerned with social effects, i. e., effects on the community at large. And that is where the deterrence theory comes in. The opinion in the Loeb-Leopold Case ignores entirely this basis of the criminal law. And that is its cardinal error.

The *deterrence* theory is the kingpin of the criminal law. The crimes contemplated but not committed bear the same ratio, or greater, to those actually committed that the submerged base of an iceberg bears to the portion visible above the surface; scientists say it is as 6 to 1. The fear of being overtaken by the law's penal-

ties is, next to morality, what keeps most of us from being offenders, in one way or another. For the professional or habitual criminals, who have ceased to care for social opinion, it is the *only* thing. A lax criminal law means greater yielding to the opportunities to crime. This is common knowledge.

So the main question here really was: Would the remission of the extreme penalty for murder in the Loeb-Leopold Case lessen the restraints on *the outside class of potential homiciders?* The answer is *yes*, emphatically. And the daily newspapers dispense us from laboring to offer any elaborate proof. On Sept. 1, after the counsel's argument for the defense had been published, two 18-year-old girls were arrested in Chicago for assisting two youths of 16 and 19 (Bill and Tony) to kill cruelly an old woman whose money they coveted. And the girls on their arrest said: "A cop told me they would hang Tony. But they can't. *There's never been a minor hanged* in Cook County. [Note that the judge later cited this point in his opinion.] *Loeb and Leopold probably won't hang. They are our age. Why should we?"* These particular reckless dastards, it seems, "wanted money for our good times, excitement, clothes, and fun," and they don't mind killing because they won't hang. On Sept. 2 a male and a female, 19 years old, were arrested for highway robbery in Alexandria, Va.; the robbery failed, by accident only, from being a murder; the female, when arrested, said: "I'm sorry I didn't get away with it; if *I had more experience, I would have.*" ("New York Times," Sept. 3, 1924.)

As everyone knows, today is a period of reckless immorality and lawlessness on the part of younger people, at the ages of 18-25. It is more or less due to the vicious philosophy of life, spread in our schools for the last 25 years by John Dewey and others—the philosophy which worships self-expression, and emphasizes the uncontrolled search for complete experience. Whatever the temporary cause of this behavior may be, it is in special need of repression. The instances above quoted show that such persons *are* amenable to the threats of the criminal law. If that law has no threat for them, they will the less try to repress their nefarious anti-social actions. Life-imprisonment has no terrors to their minds. It takes not only imagination, but an experience of it, to sense any of that terror. But hanging is a penalty that needs no imagination and no experience. Everybody has sufficient horror of that—everbody except the crazy and the mere child.

And that is where we see the special, dangerous error of the

court's opinion in the Loeb-Leopold Case, in basing the mitigation on the offenders being "under age"—that is, under 21. What has the 21-year line to do with the criminal law? Nothing at all, nor ever did have. The 21 years is merely an arbitrary date for purposes of property rights, family rights, and contract rights. For purposes of criminal law the only question is: *Are persons in general of their age at bar susceptible to the threat of the law's extreme penalty? Would it help to deter them?*

It certainly would. Those two clever female miscreants of 18 that helped choke the old woman to death were smart enough to perceive the difference between hanging and imprisonment. Loeb and Leopold were clever enough to understand it; else why did they take such ingenious pains to avoid detection and to leave the country? As a matter of fact, the only thing that they did fear was the criminal law. Neither personal morality nor social opinion imposed any limit on their plans. The only repressing influence on them was the criminal law. To mitigate its penalty for them was therefore to "take the lid off" for all unscrupulous persons of their type.

And that is what the sentence of the judge in this case has done for Cook County!

JOHN H. WIGMORE.

Note.

It has been suggested that one defect in the case, was in the law which left it to a single man to determine whether the punishment should be death or life imprisonment. This seems to be a very doubtful procedure in cases of this kind however much can be left to the discretion of the court in other cases.

Mr. Wigmore's emphasis on "the *deterrence* theory" as "the kingpin of the criminal law" deserves widespread public attention, particularly in connection with crimes of violence.

F. W. G.

The Commission on Pensions, created by Chapter 43 of the Resolves of 1923, and consisting of Frank H. Hardison of Wellesley Hills, Mrs. William G. Dwight of Holyoke, Charles J. Mahoney of Boston, Royal Robbins of Brookline and Allyn A. Young of Cambridge, has made a partial report (S. 340), in which the following chapter appears. The report has not yet been acted on by the Legislature.

Chapter XII.

PENSIONS AND RETIRING ALLOWANCES FOR JUDGES.

In various ways the problem of the proper treatment of members of the judiciary with respect to pensions and retiring allowances has features peculiar to itself. Foremost among the circumstances which make this a special problem are the provisions of the Constitution of Massachusetts with respect to the tenure of judicial office.

Article I of Chapter III of the Constitution provides that "All judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: Provided nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature." Life tenure is thus assured to judges, and this provision creates at least a presumption that they should receive full or partial salaries for life.

By Article LVIII of the Amendments to the Constitution, adopted in 1918, the following words are added to the article just quoted: "And provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." Thus far no judge has been retired under this amendment.

Until recently the provisions made by the law for the voluntary retirement of judges have been associated with provisions for pensions. Those provisions, as they stand in sections 61 to 65 of chapter 32 of the General Laws rest upon statutes running back as far as 1885. In recent years, however, important modifications have been made. It will conduce to a clearer understanding of a somewhat complicated situation if the provisions which were in force before 1920 are first described, so that the significance of the later amendments may be understood.

Before these amendments were made, a justice of the supreme judicial or the superior court, or a judge of the land court or of probate and insolvency, was entitled to receive, upon his retirement, an annual amount equal to three fourths of the salary he was then receiving. Four different modes of retirement were provided for, all carrying with them eligibility to a pension. (1) Having attained the age of seventy, and having served in one or more of said courts for at least ten consecutive years, a justice or judge might resign his office. (2) Having attained the age of sixty, and having served in one or more of said courts for at least fifteen consecutive years, and, further, having become disabled for the full performance of his duties, he might, with the approval of the governor and council, resign his office. (3) He might, under Article LVIII of the Amendments to the Constitution, be retired by the governor and council, because of advanced age or physical or mental disability. (4) A justice of the superior court, having attained the age of seventy, and having served in one or more of the said courts for at least ten consecutive years, might, instead of resigning, "retire from active service." In such case he could, with his own consent, be called upon for service by the chief justice, and be paid for the expenses actually incurred while holding court elsewhere than at his place of residence. He would not, however, be counted in the number of justices provided by law for the superior court.

Justices of the municipal court of the city of Boston might likewise retire on three fourths pay, after having attained the age of seventy, and after having served in that court at least twenty years. Other district court judges might, with the approval of the governor and council, retire under like conditions and receive three fourths pay.

It will be seen that a common provision, applying to the justices and judges of the different courts, enabled them to retire voluntarily at seventy years of age upon three-fourths of the salary paid them at the time of their retirement. Important changes were made, however, by chapters 614 and 627 of the Acts of 1920. The first of these chapters affected the justices of the municipal court of Boston, the other applied to the justices of the supreme judicial court, the superior court, and the land court. These acts authorized the paying of increased salaries to the justices of the courts named, but only upon the condition that a justice accepting the increase of salary should not be entitled to receive a retirement pension, except in the case of retirement by the governor and council under Article LVIII of the Amendments to the Constitution. In other words, justices then on the bench were given the option of receiving larger salaries or of retaining the privilege of voluntary retirement on three-fourths pay. As a result of this change and of other amendments to the law, the present position of members of the judiciary in respect of pensions is as follows.

Justices of the Supreme Judicial Court. — By chapter 375, Acts of 1923, the justices of the supreme judicial court who were then in office were given a salary increase of $2,000 in lieu of that provided by chapter 627 of the Acts of 1920, without forfeiture of their pension rights. The status of such justices in respect of retirement and pensions, therefore, is what it was before the act of 1920 was put on the statute books. The increase of salary, however, does not affect the amount of pension, which is put at three fourths of the salary ($10,500 in the case of the chief justice and $10,000 for associate justices) which was paid before the increase was granted. These provisions, it is important to note, apply only to justices who were on the bench when chapter 375 of the Acts of 1923 took effect, that is, on June 10, 1923. Justices appointed after that date have no pension rights whatever, except in the unlikely case of retirement by the governor and council under the provisions of Article LVIII of the Amendments to the Constitution. In such case they are entitled to a pension of one-half of the old salary level which prevailed before the increase of 1920 was made.

Justices of the Superior Court. — If appointed prior to June 4, 1920, and if he did not accept the salary increase provided by Chapter 627 of the Acts of 1920, a justice of the Superior Court retains the pension rights that have been described above. If appointed after that date or if, having been in office at that time, he elected to take an increase of salary, he is entitled to a pension only if retired by the governor and council as provided by Article LVIII of the Amendments to the Constitution, and in such case the pension is one-half the salary ($8,000) a like judge would have received before increases were authorized by the act of 1920.

Judges of the Land Court. — The present position of judges of the land court in respect of pension rights is identical with that of justices of the Superior Court.

Judges of Probate and Insolvency. — If appointed before July 1, 1921, judges of probate and insolvency retain the pension rights that have been described above. If appointed after that date they are entitled to pensions only if retired by the governor and council as provided by Article LVIII of the Amendments to the Constitution. In such case the pension is fixed at one-half the salary a like judge was entitled to receive prior to July 1, 1921.

Chief Justice and Associate Justices of the Municipal Court of the City of Boston. — If they were appointed before June 4, 1920, and if they did not accept the increased salary provided by chapter 614 of the Acts of 1920, such justices retain the right to retire on three-fourths salary after attaining the age of seventy and after at least twenty consecutive years of service. If appointed after June 4, 1920, they do not have this privilege of voluntary retirement on three-fourths pay. If appointed before February 1, 1923, they had the option of joining the contributory retirement system established for the employees of Boston and Suffolk County by chapter 521 of the Acts of 1922. If appointed after February 1, 1923, their membership in that retirement system is compulsory. Finally, whatever the date of his appointment, a justice retired by the Governor and council under the provisions of Article LVIII of the Amendments to the Constitution is entitled to a pension equal to half the salary a like justice was entitled to receive prior to June 4, 1920.

Judges of Other District Courts. — If appointed before July 1, 1921, such judges retain the right to retire at the age of seventy, after twenty years of consecutive service, on three-fourths salary. If retired by the governor and council under the provisions of Article LVIII of the Amendments to the Constitution, the pension is fixed at three-fourths of the salary received immediately prior to January 1, 1924. If appointed subsequent to July 1, 1921, however, a judge retired under that Article is entitled to a pension equal to only half of the salary a like judge was entitled to receive immediately prior to July 1, 1921. Furthermore, only in case of such involuntary retirement is a judge appointed after July 1, 1921, entitled to receive a non-contributory pension. The Boston Retirement Act of 1922 covers the judges of any district court in Suffolk County in the same way that, as explained above, it applies to the justices of the Boston municipal court. Judges of other district courts, like the justices and judges of other courts in the commonwealth, excepting only the Boston municipal court and district courts in Suffolk county, are not included in any of the contributory retirement systems provided for state and county employees.

Whatever the right solution of the problem of judges' pensions may be, it is clear that the present legal status of the matter is complicated and characterized by inequalities and inconsistencies. The factor which more than any other is responsible for this confused situation is the attempt made by the statutes of 1920 to use increases of salary as a substitute for retirement pensions. With the wisdom of the increases of salary granted at that time the present Commission is not concerned. It is not called upon to express an opinion as to whether those increases were or were not justified upon grounds wholly dissociated from the matter of pensions, — such, for example as the marked increase of the cost of living and the concurrent general increase of the incomes which men eligible for appointment to the bench might earn in the private practice of their profession. But it is proper for the Commission to say that, in its opinion, pensions and increases of salary do not stand on exactly the same footing. One is not a complete offset for the other.

Other things being equal, of course, a larger salary, carrying with it the possibility of increased saving, may be assumed to diminish somewhat the need for a pension. On the other hand, however, the larger salary does not accomplish all of the ends which a pension serves. First, it does not, in equal measure, contribute to that feeling of security, of absence of concern with respect to the financial contingencies of the future, which is a highly desirable safeguard of the dignity, the independence, and the disinterestedness of the judge's position. Second, it does not, in equal measure, tend to facilitate the voluntary retirement of judges at a time when the infirmities of advanced age would make such retirement desirable. It is true that Article LVIII of the Amendments to the Constitution makes their compulsory retirement possible. Thus far, however, no retirements have been made under the provisions of that Article, and, in the nature of the case, it is unlikely that the governor and council would exercise their power to retire a judge "because of advanced age or mental or physical disability," except under extreme and aggravated circumstances.

Article I of Chapter III of the Constitution, providing as it does that judicial officers shall "hold their offices during good behavior" stands in the way of the fixing, by statute, of a specified age at which judges should retire. Proposals have been made looking toward such an amendment of the Constitution as would make a statutory age of retirement for judges possible. Even if it were clearly within the province of the present Commission to recommend such an amendment to the Constitution, it would be loath to do so. The life tenure which is now assured to judges is commonly recognized in this and in other countries as being in harmony with the general system of an appointive judiciary, — a system which few conversant with the history of appointive and elective systems in American states would wish to change. Again, any specific age that might be set for the compulsory retirement of judges — seventy, for example — would have operated in the past to deprive the commonwealth of the services of some of its most distinguished judges at a time when they were at the height of their powers and their usefulness. In specific cases such an age limit would undoubtedly operate in the same manner in the future. Furthermore, requiring a definite age for retirement would undoubt-

edly make appointments to the bench less attractive to men of fifty years of age or more.

This last consideration would have especial force in the absence of provisions for a pension. In fact, even without a compulsory retiring age, the absence of provisions for a pension is bound to make it decidedly more difficult to induce men of mature years to accept appointment to the judiciary. Of the judges on the bench in 1920 it was only the younger ones who accepted the option of an increase in salary. The older judges naturally deemed it more important to retain their pension rights. In a similar way, the existence of pension rights would be a matter of greater weight to the older than to the younger men at the time of their appointment to the bench.

These factors have most significance in connection with the problem of maintaining the personnel of the higher courts at the highest possible level in respect of ability and experience. In the past the average age of justices of such courts, at the time of their appointment, has been only a little less than fifty years. Many justices who have served the Commonwealth with great distinction were much older when they were first appointed. It is clearly undesirable to weight the advantages of a judicial appointment in such a way as to discriminate against men of maturity, experience, and proved ability. And yet such discrimination is the inevitable accompaniment of the absence of provisions for the pensioning of judges upon their voluntary retirement.

For similar reasons, moreover, the position of the justices of the higher courts has to be differentiated from that of public employees in general. Elsewhere in this report, the Commission recommends the establishment of a unified system of contributory retiring allowances, covering, so far as practicable, all public employees. It has given careful consideration to the possible inclusion of judges under the provisions of this general contributory system. It recommends that judges of district courts, including justices of the municipal court of Boston, be permitted at their own option, to join the contributory system. This would put such judges into precisely the same relation to the comprehensive system of retiring allowances that the Commission recommends for public officials whose tenure of office is sufficiently secure to make it feasible for them to participate in that system.

Even in the case of judges of the district courts, the advantages of the contributory system are not large. The obstacles in the way of providing for the retirement of the justices and judges of the higher courts by permitting them to join the contributory system seem insuperable. Appointed as they are at an age commonly notably greater than that of the general run of public employees, their annual contributions would be spread over a relatively short period of years, and the amount accumulated would be comparatively small. The contribution made by the State would constitute a very small percentage of a judge's salary. In short, a judge's aggregate retiring allowance would be much smaller, as compared with the salary he had received up to the time of his retirement, than that of the average public employee. Membership in the contributory system, therefore, would not, in any substantial way, serve one of the principal ends of pensions for judges, namely, that of facilitating the voluntary retirement of a judge who finds himself failing in physical or mental vigor.

The Commission sees no way of accomplishing that end, or of securing for the judges of the higher courts any of the benefits of adequate retiring allowances, save by re-establishing, in part, the provisions for non-contributory pensions that were in force before 1920 and that have been taken away (so far as later appointees are concerned) by subsequent legislation. The draft of an Act to accomplish that result is subjoined.

It will be observed, however, that the Commission proposes that the amount of the pension be made equal to half, instead of three-fourths, of the salary the justice or judge was receiving at the time of his retirement. A precedent for putting the pay of judges retired from active service at this figure is afforded by the present laws of the Commonwealth relating to the pay of judges who are retired by the governor and council under the provisions of Article LVIII of the Amendments to the Constitution.

It will be observed, further, that the only form of voluntary retirement which, according to the proposals of the Commission, should carry with it the right to receive half pay, is not "resignation" but "retirement from active service." The judge thus retired might, in case his health and strength permitted, be called upon from time to time for special service. Except in case of real disability, therefore, his half-pay allowance would not be wholly in the nature of a pension. Like the retired officers of the army and navy, he would, in effect, be a member of a reserve that might be called upon for public service in case of need. This provision appears to the Commission to be desirable in every way, and in particular to be in harmony with the principle of the life tenure of judicial office, embodied in Article I of Section III of the Constitution.

On November 25, 1924, the Commission held a public hearing on the question of pensions for members of the judiciary. Representatives of the judiciary and of the bar explained the effects of the operation of the present laws, and urged the desirability of an adequate pension system. The judges who appeared before the Commission had, for the most part, received their appointments before 1920, so that their own pension rights were not in question. They presented the matter as one involving primarily the interests of the Commonwealth, rather than of the judges now on the bench.

At some of the hearings held by the Commission on the general subject of old-age pensions, opposition to pensions for judges was occasionally voiced. In some instances, judges' pensions, along with all other public service pensions, whether contributory or non-contributory, were held to be objectionable. In other cases much was made of the fact that particular judges, who were possessed of independent fortunes, had retired on pensions.

The Commission is not impressed by an argument which proceeds on the basis of a general hostility to all forms of retiring allowances for public employees of whatever class. Nor is it impressed by an argument which proceeds upon the basis of an individual or exceptional case as contrasted with a typical or prevalent condition. It makes its recommendation for the re-establishment of judges' pensions after fully weighing the objections that have been brought to its attention and, in particular, after considering the possibility of recommending that some system of contributory pensions be established for the judges of the higher courts, and after concluding that such a system would be impracticable.

In coming to the conclusion it has reached the Commission has been influenced largely by three fundamental considerations. (1) The Constitution of the Commonwealth provides for the life tenure of judicial office. For reasons that have been explained, the Commission believes that constitutional provision embodies a sound public policy. (2) It is desirable that the necessity of earning an income should not stand in the way of the voluntary retirement of judges who have reached an age at which their physical or mental vigor is impaired. (3) The salaries that judges receive are and must be less than the incomes which the men best qualified for appointment to the higher courts could secure in the private practice of their profession. The Commonwealth cannot compete with these outside opportunities in respect of the incomes it can provide for the members of its judiciary. The most that it can do and the least which it should do is to make judicial office dignified, adequately paid, and free from uncertainty respecting financial provision for old age. It is important that the Commonwealth should be able to continue to entrust the administration of justice to men of ripe experience and of high abilities.

DISSENTING REPORT OF CHARLES J. MAHONEY.

I feel compelled to dissent from the recommendation of the majority of the commission in the matter of pensions for judges of the higher courts. I agree with my colleagues on the commission that the commonwealth must have a judiciary of the highest standard possible to obtain. The courts of Massachusetts have had in the past a reputation second to none in the opinion of members of the legal profession. I have a high regard for the opinions of the other members of the commission and the

motives which actuated them in making their recommendation but I do not feel that the adoption by the legislature of their recommendation for a one-half pay pension for such judges on voluntary retirement will materially aid in accomplishing what is desired, namely, that the very best qualified men be attracted to the position of judges.

I feel compelled to dissent from the recommendations of one-half pay pensions for judges on their voluntary retirement for the following specific reasons:

(1) There is no proof that the abolition of pension rights has led to deterioration in quality of appointments.

(2) Judges of the higher courts appointed during the past few years, since the change in the pension laws applying to judges, are not included under the laws providing pensions for judges on voluntary retirement. The only pension provisions for these recently appointed judges are upon retirement by the governor and council for disability in accordance with Article LVIII of the Amendments to the Constitution. No evidence has been submitted to the commission that these recently appointed judges are inferior in calibre to those appointed before 1920 when the pension laws were in full effect. The Executive Department seems to have been able to secure good judges without the pension inducement.

(3) The legislature in June, 1920, by the passage of Chapter 627 of the acts of that year increased the salaries of judges of certain courts, if they waived their pension rights. The increases were accepted by most of the judges affected; the judges who wished to retain their pension rights had an opportunity to do so by declining to accept the increase in salary.

(4) To do away with the numerous injustices and inequalities of the present pension laws relating to public employees the commission has recommended that the laws be unified and that new employees contribute something toward their retirement allowances. The judges as a class have much higher salaries than other public officials and employees and I can see no reason why they should be granted non-contributory pensions, particularly as the commission has recommended that other public employees, most of whom have small salaries as compared with the salaries of justices of the higher courts, be compelled to become members of a contributory retirement system.

(5) To do away with inequalities and special privileges, the commission has recommended that no class of employees have any special privileges. It deemed it advisable for the best interest of the public service in the commonwealth to recommend that special privilege pensions now applying to certain Spanish and World War veterans be repealed. It is decidedly anomalous for the commission to recommend the restoration of non-contributory pensions to one class of public servants at a time when it is recommending the taking away of the special pension privileges of another class.

(6) The commission, I believe, was particularly appointed to consider the subject of old age pensions. On account of the numerous matters referred to it and the need of presenting a full and comprehensive report, the commission has found it necessary to ask the legislature for further time in which to submit its report on old age pensions. I do not believe the commission at this time should recommend non-contributory old age pensions to a certain class of high salaried public officials when it is not ready to report upon general old age pensions.

(7) In all its other recommendations the commission has been guided by the principle that all new public employees ought to be included as members of a contributory retirement system and should make some contributions toward their own retirement allowances. The commission in its other recommendations has taken the ground that all new employees should be put on a uniform basis so far as pensions are concerned and that no more public employees should be included under special privilege non-contributory pension plans. The commission should not depart from this fundamental principle in considering pensions for judges.

CHARLES J. MAHONEY.

III.

An Act relating to Pensions for Judges.

Sections sixty-one, sixty-two, and sixty-three of chapter thirty-two of the General Laws, as amended by sections three and four of chapter four hundred and eighty-six and section seven of chapter four hundred and eighty-seven of the acts of nineteen hundred and twenty-one, are hereby amended to read as follows:

Section 61. A justice of the supreme judicial or superior court, or any judge of the land court or of probate and insolvency, who has attained the age of seventy and who has served in any or all of said courts for at least ten consecutive years, may retire from active service and shall during the remainder of his life receive an amount equal to one-half of the salary which was payable to him at the time of his retirement from active service, to be paid by the commonwealth in the same manner as the salaries of the other justices or judges of said courts. A justice or judge of any of the said courts who has retired from active service as provided in this or the following section, may thereafter perform service with his own consent. Such service shall be upon the written request of the chief justice of the supreme judicial or of the superior court, of the judge of the land court, or, in the case of a judge of probate and insolvency who has retired from active service, of the governor. When so performing service such justice or judge shall receive, on the certificate of the chief justice of the supreme judicial or superior court, of the judge of the land court, or of the register of a court of probate or insolvency, his expenses actually incurred while holding court in any place other than his place of residence. He shall not be counted in the number of justices provided by law for the said courts. Nothing in this section shall affect any rights that any present justice of the supreme judicial or superior court or any present judge of the land court or of probate and insolvency may have to retire or resign his office under the laws creating such rights or to receive upon such retirement or resignation a larger annual amount than is herein provided.

Section 62. A justice of the supreme judicial or superior court, or any judge of the land court or of probate and insolvency, who, having attained the age of sixty and having served in any or all of said courts for at least ten consecutive years, shall have become disabled for the full performance of his duties as such justice or judge by reason of illness or otherwise, may, with the approval of the governor and council, retire from active service, and shall thereafter during the remainder of his life receive the same amount as provided in the preceding section, in the manner provided therein, provided, that nothing in this section shall affect any rights that any present justice or judge of the aforesaid courts may have under the laws creating such rights to resign his office or to receive upon such resignation a larger annual amount than is herein provided.

Section 63. A justice of the supreme judicial or superior court, or any judge of the land court or of probate and insolvency, who is retired by the governor, with the consent of the council, because of advanced age or mental or physical disability, according to the provisions of Article LVIII of the Amendments to the Constitution, shall during the remainder of his life receive an amount equal to one-half of the salary which was payable to him at the time of his retirement, to be paid by the commonwealth in the same manner as the salaries of justices or judges of said courts, provided that nothing in this section shall affect any rights that any present justice or judge of the aforesaid courts may have under the laws creating such rights to receive upon retirement according to Article LVIII of the Amendments to the Constitution, a larger annual amount than is herein provided.

Editor's Note.

The above report has not yet been acted on by the Legislature. It deserves the consideration of the bar and the public.